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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY AS TRUSTEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court's memorandum opinion (R. 27–31) is not reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a–29a) is reported at 227 F. 2d 359.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1955. (Appendix A, *infra*, p. 30a.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether liens for unpaid federal taxes accorded the United States by Sections 3670–3672 of the Internal Revenue Code of 1939 are superior to an inchoate mechanic's lien created by state law, the federal liens having arisen and been recorded before the mechanic's lien was reduced to judgment.

STATUTES AND RULE INVOLVED

Sections 3670, 3671, 3672, 3678, 3679, 3690, 3692, and 3700 of the Internal Revenue Code of 1939, Rule 4 (d) (4) of the Federal Rules of Civil Procedure, Sections 74.01, 74.07, 74.09, 74.11, 74.13, 74.14, 74.15, 74.16, and 74.19 of the Illinois Mechanics' Lien Act are printed in pertinent part in Appendix B, *infra*, pp. 31a–40a.

STATEMENT

This action was brought by the United States in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to Section 3678 of the Internal Revenue Code of 1939, to foreclose liens for unpaid taxes assessed against the McAvoy Brewing Company, Inc. (herein sometimes referred to as the taxpayer). The White Bear Brewing Company, Inc., and the Chicago Title and Trust Company were made parties defendant as transferees from taxpayer of real estate subject to the federal tax liens (R. 7–11). The defendant White Bear moved to dis-

miss the complaint (R. 18–19), and the District Court found the facts to be as alleged in the complaint and the Government's brief (R. 26–28). These undisputed facts may be summarized as follows:

The Commissioner of Internal Revenue assessed income, withholding, and employment taxes against the taxpayer for the years 1947 and 1948, in amounts totaling approximately $25,000. The assessment lists for these taxes were received by the Collector on various dates between November 17, 1947, and December 22, 1948. The United States demanded payment of the taxes, but payment was not made. Notices of liens for the taxes were filed on various dates between December 16, 1948, and April 28, 1949. (R. 7–12, 26–28.)[1]

On May 19, 1947, one Deutsch completed work on the taxpayer's real estate, pursuant to a contract entered into on February 14, 1946. On September 2, 1947, he filed a notice of a "Claim for Lien" under the Illinois Mechanics' Lien Act, in the amount of $8,286. On November 13,

[1] As the court below notes (App. A, *infra*, p. 6a), notices of the federal liens for over $16,000 were recorded on dates before April 28, 1949, the date the mechanic's lienor recovered his judgment. (R. 7–9, 12.) Since these earlier recorded liens were held to be primed by the mechanic's lien, and since they exceeded the amount of the sale proceeds the mechanic's lienor recovered, it is unnecessary to consider here the additional federal lien of which notice was recorded on April 28, 1949, the date of the mechanic's lienor's judgment. Thus, the issue, as posed below and here, is between a recorded federal tax lien and a mechanic's lien before judgment.

1947. Deutsch brought suit to enforce the lien in the Illinois Circuit Court of Cook County. On April 28, 1949, a judgment was entered in that action in favor of Deutsch in the amount of $10,502.35. On June 28, 1949, the real estate in question was sold to Deutsch at public auction for $11,500, and the sale was approved by the Illinois court. The book value of the property at that time was about $315,000, and its forced sale value was about $75,000. Thereafter, Deutsch transferred the property to others, who in 1952 sold it to White Bear Brewing Company, Inc. (R. 20–23, 26–28.)

The United States thereafter brought this action to foreclose its tax liens (R. 4, 7–11), and the defendant White Bear moved to dismiss the complaint (R. 18–19). The District Court granted the motion to dismiss (R. 27–31), holding that the mechanic's lien "attached and was complete, under Illinois law, at the time it was filed," and that it took precedence over the federal lien (R. 30).

The Court of Appeals affirmed, Judge Lindley dissenting (Appendix A, *infra*, pp. 1a–29a). Reading the federal tax lien statutes and the Illinois statutes creating the mechanic's lien, the majority found the two types of lien indistinguishable, stating that "whatever is said about an Illinois mechanic's lien also fits a federal tax lien" (*id.*, p. 17a), that the federal lien in this case was no more "specific or particular" than

the mechanic's lien (*id.*, p. 20a), and that "these two liens simply had different periods of gestation" (*id.*, p. 23a). In response to the Government's argument that the state-created lien could not displace the federal lien by a doctrine of relation back, the court considered the recent decisions in *United States* v. *Acri*, 348 U. S. 211, *United States* v. *Scovil*, 348 U. S. 218, and *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215, and observed (App. A, *infra*, pp. 21a–22a) that their "reasoning attributes to Congress an intention to deprive State lienholders of priority contrary to the principle, first in time first in right." The court concluded that under the foregoing principle and under *United States* v. *New Britain*, 347 U. S. 81, which the opinion describes (App. A, *infra*, p. 24a) as "still unreversed," the mechanic's lien should prevail over the federal tax lien.

Judge Lindley, dissenting, held that this case is controlled in favor of the federal lien by *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47, by the *Acri*, *Scovil*, and *Liverpool & London* decisions, *supra*, and by *United States* v. *Colotta*, 350 U. S. 808 (App. A, *infra*, pp. 24a–29a).

REASONS FOR GRANTING THE WRIT

Explicitly questioning this Court's reasoning in recent cases which squarely control this one, the decision below departs from the rule laid down in those cases—that the federal tax lien pre-

vails over an adverse lien which, though it may have arisen earlier, has not become specific and perfected, and is therefore still inchoate when the federal lien arises. *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Colotta*, 350 U. S. 808. The departure rests at least in part on what we believe to be a misreading of *United States* v. *New Britain*, 347 U. S. 81, which, as is made clear by the subsequent decisions in the last four of the five cases cited above, merely held that a state-created lien which is specific and perfected may prevail over a federal tax lien arising later. In addition to its inconsistency with this Court's decisions, the decision below conflicts with the recent rulings of the Supreme Court of Washington in *Fleming* v. *Brownfield*, decided November 17, 1955 (1956 C. C. H., par. 9138, reprinted as Appendix C, *infra*, pp. 41a–53a) and the Maryland Court of Appeals in *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613.[2] The recurrent character and continuing

[2] See also *United States* v. *Kings County Iron Works*, 224 F. 2d 232 (C. A. 2d); *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555; *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413; *Bankers Title & Abstract Co.* v. *Ferber Co.*, 15 N. J. 433; *United States* v. *Hawkins* (C. A. 9th), decided December 13, 1955 (1956 C. C. H., par. 9143); *In the Matter of Chatsworth Investment* (S. D. Cal.), decided October 28, 1955 (1955 C. C. H., par. 9777).

importance of the problem presented,[3] reflected by the several occasions on which this Court has seen fit to consider it, fully justify review and reversal in this case. The alternative, we submit, would be further inroads on principles recently and clearly announced by this Court and divergencies from state to state and court to court in a matter requiring uniform, equal treatment across the nation. See *United States* v. *Gilbert Associates,* 345 U. S. 361, 364.

In *United States* v. *Security Tr. & Sav. Bk., supra,* this Court made it plain that the effect of an adverse lien in relation to the federal tax lien is always a federal question; that a prior "inchoate" lien under state law cannot take precedence over a subsequent lien of the United States for unpaid taxes; and that the local law lien does not attain the status of a choate or perfected one, so as to defeat a subsequently arising federal tax lien, where it remains "contingent upon taking subsequent steps for enforcing it." 340 U. S. at 51. In holding that tax liens of the United States were superior to a preexisting attachment lien created under California law, the Court

[3] While the federal liens here involved arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939, the Internal Revenue Code of 1954 reenacts these provisions without substantive change. See Sections 6321, 6322, and 6323 of the 1954 Code; H. Rep. No. 1337, 83d Cong., 2d sess., pp. A406–A407; S. Rep. No. 1622, 83d Cong., 2d sess., pp. 575–576.

pointed out that the attaching creditor had acquired only an inchoate lien because (p. 50)—

> The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment * * *. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

The court held further (*ibid.*) that the attachment lien could not be deemed to have become choate as of the date of the attachment by virtue of any "doctrine of relation back" of the subsequently obtained judgment, for to apply such a doctrine would "destroy the realities of the situation."

Reaffirmed a year ago in the *Acri, Liverpool & London,* and *Scovil* cases, and still more recently in *Colotta,* the foregoing principles are plainly applicable here. It is undisputed that the federal liens arose and were recorded prior to the time that the mechanic's lienor obtained a judgment fixing the amount of his claim.[4] And until a

[4] Under Code Section 3671 (Appendix B, *infra*, p. 31a) the federal lien arises when the assessment list is received by the Collector. The assessment lists covering the unpaid taxes here involved were received by the Collector between November 17, 1947, and December 22, 1948, while the judgment in favor of the mechanic's lienor was entered on April 28, 1949. (R. 7–9, 26.) See p. 3 and fn. 1, *supra.*

judgment was obtained, the mechanic's lien was not enforceable in any particular amount. Under the Illinois Mechanics' Lien Act, 13 Jones Illinois Statutes Annotated, Section 74.01 *et seq.* (Appendix B, *infra,* pp. 35a–40a), the mere filing of a mechanic's lien, or of a suit for its enforcement, does not of itself determine the correctness or the amount of the lienor's claim. On the contrary, that statute permits the property owner to interpose any defense to the suit, whether by way of answer, set-off, recoupment or counterclaim. *Id.,* Section 74.13 (*infra,* p. 38a). It also permits any other lien claimant to "contest" the mechanic's lienor's claim, "as well with respect to the amount due as to the right to the benefit of the lien claimed." *Id.,* Section 74.09 (*infra,* p. 37a). Only after the "creditor" has "obtained a decree or judgment" is the court empowered to order a sale of the property against which the lien is asserted. *Id.,* Section 74.14 (*infra,* pp. 38a–39a). Thus, pending the suit to enforce the lien and entry of a judgment in the lienor's favor, neither the validity nor the amount of his claim can be said to have been established. Indeed, as the Court of Appeals observed in this very case (App. A, *infra,* pp. 20a–21a), there was "an unexplained difference" of some $2,000 between the mechanic's lienor's claim and the judgment he ultimately recovered (in this case the judgment was greater; in another it could just as well be smaller or unrecoverable). See the particular reference to this

point in the conflicting decision of the Washington Supreme Court, *Fleming* v. *Brownfield* (App. C, *infra,* at p. 50a). It is clear, in short, that until judgment a mechanic's lien created by Illinois law is no less "inchoate" or "contingent" as against the federal lien than the attachment, garnishment, and mechanics' liens considered in the *Security Trust, Acri, Liverpool, Scovil,* and *Colotta* cases.

Mistakenly invoked by the court below, with what appears to us to be an immaterial observation that it is "still unreversed" (App. A, *infra,* p. 24a), *United States* v. *New Britain* in no way impairs the controlling force of the cases both preceding and following it. While holding that prior state liens may defeat the federal tax lien when they are "perfected in the sense that there is nothing more to be done to have a choate lien" (347 U. S. at 84), the *New Britain* decision itself reaffirmed the rule (p. 86), again restated thereafter in *Acri, Liverpool,* and *Scovil,* that "inchoate" liens which "may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach * * * cannot then be permitted to displace such federal liens." It is this latter rule which applies in the instant case.

If further confirmation were required of the validity of this rule so lately and frequently enforced by this Court, it is supplied by *United*

States v. *Colotta,* 350 U. S. 808. There, this Court granted certiorari and, without further briefs or argument, summarily reversed a state court holding that a mechanic's lien was superior to a subsequently arising federal tax lien. In *Colotta,* at the time the federal lien arose the contract giving rise to the mechanic's lien had already been entered into and the work had already been completed, but steps had not yet been taken to obtain a judgment. While in the instant case a suit had been commenced to enforce the mechanic's lien before the federal lien arose, under the controlling principles the result can be no different. The decisive point remains that the adverse lien had not been perfected—neither its amount nor its validity had been finally established—when the federal lien arose and was recorded.

Ignoring this crucial point, the court below affirmed the District Court's dismissal of the Government's complaint solely on the ground that the mechanic's lien antedated the federal lien.[5] In

[5] The District Court alternatively held (R. 30) that the United States was precluded from bringing this action to enforce its lien, on the theory that it was obliged but failed to intervene in the state court proceeding brought to enforce the mechanic's lien—a theory patently contrary to the Congressional scheme for enforcement of the federal lien. 1939 Code Section 3671 provides that the federal lien shall continue until satisfied or barred by lapse of time; Section 3672 provides that where (as here) the federal lien is recorded it is enforceable even as against a subsequent purchaser; and Sections 3678–3679 provide for its enforcement by separate civil action in a District Court of the United States. See

so doing it failed to give effect to the repeated holdings of this Court that the federal lien must prevail over prior liens which are not choate—specific and perfected.

CONCLUSION

The facts upon which this case turns are undisputed, and the question of law presented has already been authoritatively resolved by this Court. To allow the decision below to stand would accord inchoate liens created by some of the states a preference over the federal tax liens not enjoyed by like liens created by other states, and would encourage further departures from the controlling principles declared by this Court. The petition for a writ of certiorari should be granted, and the decision of the court below reversed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General,
CHARLES K. RICE,
Acting Assistant Attorney General,
HARRY BAUM,
STANLEY P. WAGMAN,
Attorneys.

FEBRUARY 1956.

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also Sections 1444 and 2410, 28 U. S. C.; *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311 (C. A. 6th), certiorari denied, 310 U. S. 630. At any rate, the court below considered it "unnecessary to reach" this question (Appendix A, *infra*, p. 24a), and affirmed the District Court solely on the ground that the federal lien was subordinate to the mechanic's lien.

In the United States Court of Appeals for the Seventh Circuit

October Term and Session, 1955

No. 11431

November 18, 1955

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WHITE BEAR BREWING CO., INC., and CHICAGO TITLE AND TRUST COMPANY as TRUSTEE, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before DUFFY, *Chief Judge,* FINNEGAN, and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Defendant, White Bear Brewing Co., Inc., is the record title-holder of property which the government, as plaintiff, by its action, filed below, would have sold, and the proceeds distributed. Chicago Title and Trust Company is a co-defendant in its capacity under plaintiff's [defendant's] purchase-money mortgage in trust deed form.

Defendant filed a motion to dismiss the government's complaint, and as the district judge cogently summarized this aspect of the record:

"The defendant has filed with its motion an affidavit setting forth additional facts, and plaintiff has in its brief presented certain facts which it offers to support by affidavit. I will assume that the latter are correct without requiring a formal affidavit. Since matters outside the pleadings have been introduced, the motion will be treated under Rule 12 (c) as a motion for summary judgment and disposed of under Rule 56." Both parties filed briefs. By his final decree, supported by a memorandum of opinion, the trial judge allowed defendants' motion to dismiss the complaint. That decree is now before us. No question of White Bear's solvency is involved.

Absent material issues of fact, we can present a sequential listing of events which will bring into sharp relief significance of certain timing:

May 19, 1947.....	Deutsch completed work pursuant to contract entered into on February 14, 1946 with Frederick's Brewing Co. for improvements on real estate in question.
September 2, 1947..	Deutsch recorded his Illinois mechanics lien. This sworn claim of lien contained a legal description of the real estate involved in the present appeal and stated the amount of lien as $8,286.00.

November 13, 1947.. Deutsch filed suit in the Circuit Court of Cook County, Illinois, in equity, to foreclose his mechanics lien. Case No. 47C 14529.

November 13, 1947.. Commissioner of Internal Revenue made an assessment of $8,709.70 against Frederick's Brewing Co., also known as McAvoy Brewing Co., Inc., for income taxes owing for the year 1947.

November 15, 1947.. Summons in the lien foreclosure suit served on Frederick's Brewing Company.

November 17, 1947.. Assessment list received by the U. S. Collector, First District, Illinois.

December 14, 1948.. Assessments by Collector against McAvoy Brewing Co., Inc., for:

(i) withholding taxes owing for the 3rd quarter, 1947. $6,362.91.

(ii) withholding taxes owing for the 4th quarter, 1947. $4,047.81.

(iii) withholding taxes owing for the 1st quarter, 1948. $2,312.55.

December 16, 1948.. Notice of tax liens [concerning assessments listed under date of December 14, 1948, *supra*] filed in Recorder's office, Cook County, Ill.

December 17, 1948.. Collector received assessment list.

December 17, 1948.. Assessments by Collector against McAvoy Brewing Co., for:

(i) Federal Insurance Contributions Act taxes owing for 3rd quarter, 1947. $911.17.

(ii) Federal Insurance Contributions Act taxes owing for 4th quarter, 1947. $245.41.

(iii) Federal Insurance Contributions Act taxes owing for 1st quarter, 1948. $520.22.

(iv) Federal Unemployment Tax Act taxes owing for year 1947. $1,817.39.

December 22, 1948.. Assessment list received by Collector, First District, Ill.

December 29, 1948.. Notice of tax liens filed with Recorder of Deeds, Cook County, Illinois.

April 28, 1949	Notice of Federal tax lien filed with Recorder of Deeds, Cook County, Illinois. (Covering income taxes of 1947, T. R. 8.)
April 28, 1949	Decree of foreclosure and sale entered in Deutsch's case No. 47C 14529. Judgment entered in favor of Deutsch, the materialman, for $10,502.35.
June 28, 1949	Date of Master's sale.
June 28, 1949	Property in question sold to Deutsch, Mechanic's lienholder, at public auction for $11,500 pursuant to decree in No. 47C 14529.[1]
September 22, 1949	Certificate of sale issued to Deutsch and recorded in Cook County, Illinois.
September 30, 1949	By its decree, Illinois Court approved sale of property to Deutsch by the Master in Chancery.
November 1, 1949	McAvoy Brewing Co., Inc., shutdown.
September 27, 1950	Deutsch assigned his certificate of sale to Yavitz.
September 28, 1950	Master's deed issued to Yavitz, in the absence of redemption.

[1] A complaint in chancery, filed in the Circuit Court of Cook County, Illinois, entitled *Fred W. Deutsch* v. *Frederick Brewing Company, et al.* (T. R. 22).

November 2, 1950... Yavitz recorded the Master's deed.

July 22, 1952..... Yavitz and wife conveyed property in question to Emma Janninga.

July 22, 1952..... Recording date of Janninga's transference of title to White Bear Brewing Co., Inc. (one of the defendants here). A part purchase-money mortgage in trust deed form, from White Bear to Chicago Title and Trust Co., to secure grantor's $31,000 note, was also recorded at this time. The total purchase price paid by defendant White Bear was $36,000.

November 10, 1953.. Government suit seeking to have property sold and proceeds distributed, filed below.

According to the "Statement"[2] (mentioned in the District Judge's memorandum) sponsored by the government, in its brief opposing defendants' motion to dismiss, notices were filed of liens for the assessments itemized in its complaint amounting to $16,217.46 and, it appears, another notice of lien, in the amount of $7,922.01 was filed on April 28, 1949. But after examining the gov-

[2] T. R. 26. This is the statement referred to by the district judge in his "Memorandum."

ernment's complaint, filed below, we find this latter notice of lien unmentioned, while the total amount claimed, in that pleading, was $16,217.46 plus interest. However, a marginal note in the plaintiff's brief suggests an explanation:[3]

> Although the District Court's memorandum does not mention employment taxes, they are nevertheless a part of this total amount. The amounts appearing in paragraphs 5 through 11 of the complaint (R. 7–9) and the next to last paragraph on page 4 of plaintiff-appellant's statement (R. 27) are exclusive of penalties or interest where due, and total $24,139.47. However, defendant-appellees admitted in their answer (R. 12) that notices of federal tax liens totaling $25,359.16 were filed in amounts including interest and penalties. The exact amounts are not material to the issues before this Court since the amount of liens exclusive of interest and penalties still exceeds the amount of proceeds from the foreclosure of the materialman's lien, $11,500. (R. 26.)

Mirrored against the backdrop of dates and facts, we have already shown, plaintiff sought the following relief below:[4]

> That all persons having lien upon or claiming any interest in the property or rights to property hereinabove described be required to submit their claims; that the merits of all claims to and liens upon the property be finally determined; that the defendants and all persons claiming under

[3] Plaintiff's brief, p. 2.

[4] A full reprint of the prayer of plaintiff's complaint is presented in our text.

them or any of them subsequent to the commencement of this action be barred and foreclosed of all right, title and interest, or lien and claim to the property and all part thereof; that the lien of this plaintiff for its taxes assessed be established and enforced against property described in its complaint; *that the property be ordered sold* in accordance with the law and the practice of this Court and that the fund resulting from such sale be ordered distributed according to the findings of the Court, in accordance with the rights and interests of the parties defendant in this suit and the United States. [Italics added.]

Because there are several cases (See: Appendix I) which on first blush seem to dispose of this appeal, adversely to defendants, we think dissecting the two liens asserted, will be revealing.

I. The Government Tax Lien

Section 3670 of the Internal Revenue Code of 1939[5] creates the lien pressed by the government in this appeal:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (*including any interest, penalty, additional amount, or addition to such tax,* together with any *costs* that *may accrue in addition thereto*) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. [Italics supplied.]

[5] 53 Stat. 448, 26 U. S. C. § 3670 (1952).

Obviously, Congress did not confer any priority[6] of the lien generated by § 3670. *United States* v. *New Britain*, 347 U. S. 81, 85 (1954). When a lien arises, and its durations are provided for in § 3671:[7]

> Unless another date is specifically fixed by law, the lien *shall arise at the time the assessment list was received by the collector* and shall continue until the liability for such amount is satisfied *or becomes unenforceable by reason of lapse of time.* [Italics ours.]

That a § 3670 lien is not a completely perpetual automatic vise clamped upon all property belonging to any person liable to pay any tax, upon his neglect or refusal to pay, is clear from that last alternative qualification in § 3671 and § 3672:[8]

> (a) Invalidity of Lien Without Notice.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *.

The struggle for relative priority between federal tax liens and other liens created by State legislatures, is usually staged in the environment

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[6] Section 3466 of the Revised Statutes [Rev. Stat. § 3466 (1875). 31 U. S. C. § 191 (1952)] is an express enactment of first priority for debts to the United States whenever the debtor is *insolvent.*

[7] 53 Stat. 449, 26 U. S. C. § 3671 (1952).

[8] 53 Stat. 449, as amended, 53 Stat. 862, 26 U. S. C. § 3672 (1952). The section had been amended by § 401, I. R. C. 1939, c. 247; and later § 505, Rev. Act of 1942, c. 619, 56 Stat. 798. For a view of the legislative history of § 3672 see the concurring opinion of Mr. Justice Jackson in *U. S.* v. *Security Tr. & Sav. Bank*, 340 U. S. 47, 51 (1950).

of those Federal statutory sections just cited because, *inter alia:* "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question." *United States* v. *Security Tr. & Sav. Bk.,* 340 U. S. 47, 49 (1950). We are confronted, then, with the problem, elusive though it may be, of investigating this federal tax *lien* in order to discover how it differs, basically, intrinsically, or at all, from a mechanic's lien created by Illinois statute. Indeed the search is stimulated by the government's assertion that its federal tax lien is "considered to be perfected *ab initio.*"[9] This, despite the barren recitation of "a lien" in § 3670.

Congress has said nothing, in the relevant statutory provisions, revealing any inherent superiority, special, peculiar, dignity, and singular characteristic or attribute of the federal tax lien. Indeed it merely used the word *lien* and let it go at that. "Lien" like most words is simply the outer covering in which a bundle of ideas have been wrapped for delivery to auditors and readers. The word is of French ancestry and, in its early usage, was taken to mean bond or tie. Chief Justice Marshall manifested a similar idea when delivering the opinion reported as *Rankin* v. *Scott,* 25 U. S. 175, 179 (1827):

> The principle is believed to be universal, that prior lien gives a prior claim, which is entitled to prior satisfaction, out of the *subject it binds,* unless the lien be intrinsically defective or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to a subsequent claimant. [Italics added.]

[9] Plaintiff's reply brief, p. 1.

Indeed, after citing and quoting that passage from *Rankin* v. *Scott,* 25 U. S. 177, 179 (1827), Mr. Justice Minton, speaking for a unanimous court in *United States* v. *New Britain,* 347 U. S. 81, 83, 86 (1954), said: "We think that Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate." Parenthetically, at least, we must record our awareness of *United States* v. *Colotta,* 79 So. 2d 474, 477 (1955) where the Supreme Court of Mississippi, determining priority between a mechanics lien and a § 3670 lien, relied upon the *New Britain* case, only to be recently summarily reversed by a terse order of the United States Supreme Court. *United States* v. *Colotta,* No. 271 U. S. Sup. Ct., Oct. 10, 1955 (24 U. S. Law Week 3092).

We have been advised by the Clerk of the United States Supreme Court that the respondents, Colotta, *et al.,* filed no brief and the record was not printed. From our examination of the unopposed petition [10] for certiorari, filed by the

[10] On page two, of the government's petition, the "Question Presented" is: "Whether a lien of the United States for unpaid federal taxes, arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939, is superior to a statutory mechanic's lien accorded by state law to contractors, laborers and materialmen, where the contract giving rise to the mechanic's lien had been performed *but no steps had been taken to file or enforce such lien before the federal lien arose and was recorded.*" [Emphasis supplied.]

government in *United States* v. *Colotta, supra,* we find that among other reasons urged for granting the writ was the alleged conflict between the Mississippi Court's decision [11] and an opinion reported as *United States* v. *Kings County Iron Works, Inc.,* 224 F. 2d 232 (2nd Cir. 1955). We are cited to the *Kings County* case by the government in the appeal now before us. Chief Judge Clark, delivering the opinion in *United States* v. *Kings County Iron Works, Inc.,* 224 F. 2d 232, 234 (2nd Cir. 1955) stated the question for disposition, as involving "* * * the relative priority of a federal tax lien and a mechanics lien under state law," and the ruling below:

> The district court awarded priority to Kings as a "purchaser" protected from *unfiled* federal liens pursuant to I. R. C. § 3672, and as a prior lienor by virtue of its filing of its mechanic's lien in New York County on August 27, 1947. Judge Abruzzo concluded that the government's prior filing on August 21 in Kings County where Preferred resided, was defective in that under N. Y. Lien Law McKinney's Consol. Laws, c. 33, § 240 the government should also have filed in New York County, where the funds and premises in question were located. D. C. E. D. N. Y., 122 F. Supp. 219. The government's appeal challenges Judge Abruzzo's final conclusion, as well as his subordinate findings concerning the character of the mechanic's lien and the

[11] The Supreme Court of Mississippi decided *U. S.* v. *Colotta,* 79 So. 2d 474 on April 18, 1955. *United States* v. *Kings County Iron Works, Inc.,* 224 F. 2d 232 was argued before the Second Circuit April 12, 1955 and that Court's decision is dated June 29, 1955.

> sufficiency of the government's filing. [Italics supplied.]

The hard core of the *King's County,* case lies embedded in this sentence of the Second Circuit's opinion:

> Here the assessment lists (ed. Federal) were *all received prior* to August 21, 1947, when notices of the liens were filed (224 F. 2d 232, 234. Italics added.)

Moreover the following passage from the Second Circuit's opinion (224 F. 2d 232, 235) spells out another difference between that case and the one we are reviewing:

> Our reading of the statutes and the cases leads us to conclude that, at least for purposes of federal taxation, Kings must be considered essentially like the holder of an attachment or a garnishment lien before it has matured into a judgment. The use of a trust fund rationale by New York in order to give the mechanic's lienor this kind of lien may be the result of the severe restrictions ordinarly imposed by that law on the attachment of debts. See N. Y. C. P. A. § 916. Until and unless the mechanic's lienor perfects his rights to the trust fund by filing a timely civil action in accordance with § 75 of N. Y. Lien Law, the contractor retains a paramount interest in the property in question, so that the debt belongs to him and is subject to federal levy as such. Furthermore, until such a suit is brought, the fact and the amount of the final mechanic's lien remain uncertain. This means that for federal tax purposes the state lien is general and inchoate until such time.

Returning for a moment, to the petition for certiorari, filed in *United States* v. *Colotta, supra,* we point out that on page 7, the government stated:

> While the contracts under which respondent's mechanics' liens are asserted were completed before the federal tax liens arose (December 5, 1952) and were recorded (December 8, 1952), respondents had neither recorded their contracts under Section 359 of the Mississippi Code * * * nor filed the *lis pendens* notice provided for by Section 380 of that Code * * *. Respondent Reinhart ultimately filed his contract on December 31, 1952 * * * respondents Chambless and Long, so far as the record reveals, never filed theirs. And the record shows no *lis pendens* notice of either contract filed at anytime. [Italics original text.]

United States v. *Scovil,* 348 U. S. 218 (1955), is the third part of the trilogy made up of *Acri* and the *Liverpool & London Globe Ins. Co., Ltd.,* cases, relied upon by the government. As Mr. Justice Minton said, *Scovil,* involved "the relative priority of a landlord's distress for rent under the laws of South Carolina and a lien for unpaid taxes due the United States." (348 U. S. 218) The nub of the *Scovil* decision is best described by the Court's own words: "The landlord had a lien other than a mortgage, pledge or judgment lien * * * the distress lien was not perfected in the federal sense at the time the Government's liens were filed. Such perfection is, of course, a matter of federal law * * *." (id. 220.)

New Britain brings into play the word *choate,* which, though of rare usage, suggests completeness. Section 3678[12] authorizes institution of a civil suit, by the government in order to satisfy its lien. In this respect the government, as lienholder, must, even as does the mere mechanics' lienholder, pursue its remedy in order to collect money by virtue of a lien. Interest accruing on a debt secured by a federal tax lien remains an unknown quantity until that lien is foreclosed.

Michigan v. *United States,* 317 U. S. 338 (1943), cited to us by the plaintiff, is inapposite despite some language that, on first reading seemingly supports the government's position in this appeal. It was there contended that local realty tax liens were to be given superiority, under state statutes, over a federal tax lien. That argument was quickly rejected because, *inter alia,* "* * * the federal lien * * * attached to private property *prior* to the acquisition of any interest in that property by the state * * *" (Italics ours), and accordingly the Court simply said "* * * we need not consider the extent to which Congress may give, or intended by § 315 (a) to give, priority to a federal lien over a previously perfected state lien." (317 U. S. 338, 341.) The *Michigan* case paid homage to the supremacy clause of the Constitution, recognizing, as we do, that the "* * * establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes.' Article I, § 8 of the Constitution." Had *Michigan* been decided otherwise, it would have been possible for a state to make its own real estate tax liens superior to a federal tax lien

[12] 53 Stat. 450, 26 U. S. C. § 3678 (1952).

though the latter lien attached to the property first.

Another familiar instance concerning priority of payments from assets of a common debtor was disposed of in *Illinois* v. *Campbell,* 329 U. S. 362 (1946), adversely to the State of Illinois, as lienholder. There the Illinois Director of Labor sued, in one of its State courts, to enforce a statutory lien for unemployment contributions due Illinois from Chicago, Waste and Textile Company, an allegedly insolvent debtor. Illinois attempted to defeat the express priority given to federal tax liens by Congress through Rev. Stat. § 3466, 31 U. S. C. § 191 on the theory that the State's lien was specific and perfected. But § 3466 is applicable only to insolvent debtors; it has no relevancy to the matter now under consideration.

Mr. Justice Story long ago wrote, recognizing the nonexistence of federal common law, this trenchant pertinent passage in *United States* v. *Bank of North Carolina,* 31 U. S. 25, 35 (1832):

> The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law * * * The claim of the United States, however, does not stand upon any sovereign prerogative, *but is exclusively founded upon the actual provisions of their own statutes.* [Emphasis supplied.]

The thrust of Justice Story's words can only be parried by a tortured reading of § 3670. Congress has just simply refrained from writing a priority into § 3670, as it did in § 3466. Whether it has the power to do so is quite beside the mark, nor can we speculate upon policy considerations,

which are beyond our province in any event. Section 3670 is silent as to priorities. We think it should be left undisturbed on the facts involved in this appeal.

As we view it there is no particular magic lurking in the word lien found in § 3670. Surprisingly enough, whatever is said about an Illinois mechanics lien also fits a federal tax lien, unless we are to insert a judicial rubic in § 3670.

II. The Mechanics Lien

Pursuant to an Act[13] for revision of Illinois laws relating to mechanics liens, passed by the State General Assembly:

> Section 1. Any person who shall by any contract or contracts, express or implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, furnish material, fixtures, apparatus or machinery, forms or form work used in the process of construction where cement, concrete or like material is used for the purpose of or in the building, altering, repairing or ornamenting any house or other building, * * * or furnish or perform labor or services as superintendent, time keeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, apparatus, machinery, labor or services, forms or form work used in the

[13] Ill. Rev. Stat. 1953, chap. 82, §§ 1–39, S. H. A. chap. 82, §§ 1–39. See: *e. g. Robertson* v. *Huntley & Blazier Co.*, 351 Ill. App. 378, 384, 115 N. E. 2d 533 (1953); *Schoenberg Mfg. Co.* v. *Broadway Hotel Corp.*, 259 Ill. App. 40, 42 (1930).

process of construction where concrete, cement or like material is used * * * shall be known under this Act as a contractor, and *shall have a lien upon the whole of such lot or tract of land* and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract related to two or more buildings, on two or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon *for the amount due to him for such material,* fixtures, apparatus, machinery, services or labor, and interest *from the date the same is due.* This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein, and shall be superior to any right of dower of husband or wife in said premises; Provided, the owner of such dower interest had knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof; nor shall the taking of additional security by the contractor or sub-contractor be a waiver of any right of lien which he may have by virtue of this Act, unless made a waiver by express agreement of the parties; *and this lien shall attach as of the date of the contract.* [Italics added.]

SECTION 7. No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, or if extra or

additional work is done or material is delivered therefor within four months after the completion of such extra or additional work * * *, he shall either bring suit to enforce his lien therefor or shall file with the clerk of the Circuit Court in the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien, verified by the affidavit of himself, or his agent or employee, which shall consist of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same. *Such claim for lien may be filed at any time after the contract is made, and as to the owner may be filed at any time after the contract is made and within two years after the completion of said contract,* or the completion of any extra work or the furnishing of any extra material thereunder, and as to such owner may be amended at any time before the final decree. *No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this act,* unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement * * *. [Italics ours.]

Speaking of section 7, quoted above from the Illinois Act, the State Supreme Court noted in

United Lock Companies v. *Volland*, 365 Ill. 564, 7 N. E. 2d 301, 305 (1937):

> These provisions of the statute disclose a manifest legislative intent to remove, as far as practicable, technical requirements as a material element of the right to enforce a valid lien, and to clarify questions touching the materiality of the steps presented by statute. A salient provision is that no lien *shall be defeated* because of unintentional error. * * * [Italics added.]

III. Conclusions

This appeal reflects several singular distinguishing characteristics in contrast with the cases already discussed and those analyzed in Appendix I: (i) the mechanic's lien-holder acquired, recorded and commenced his foreclosure suit before the first relevant assessment list was received by the U. S. Collector, (ii) the property involved has long since left the taxpayer's hands and MacAvoy Brewing Co. is completely divested of any title or interest, (iii) the government did not participate, in any manner, in the Illinois Mechanic's lien foreclosure proceedings despite Deutsch's prior recordation of his lien. As we mentioned earlier, in this opinion, Deutsch's claim contains a legal description of the property on which his lien attached, a statement of the basis for the claim and a recital of the specific dollar amount claimed. Our canvas of the record fails to show how the federal tax lien was any more specific or particular than Deutsch's lien. We notice an unexplained difference between Deutsch's original claim of $8,286.00 and his

judgment, obtained therein, for $10,502.35. There is also a marked time lag between the first federal tax lien (November 17, 1947) and plaintiff's commencement of suit on November 10, 1953, which lead to the judgment appealed.

It is quite clear that the only way the government can prevail on these facts is to have us reject the rule, "the first in time is the first in right," reiterated by Mr. Justice Minton in *United States* v. *New Britain*, 347 U. S. 81, 85 (1954). To persuade us in doing so, the government cites us to the cases, among others, which we present in Appendix I. From our analysis it is patent that all these cases, shown in Appendix I, vary factually from the instant appeal. Furthermore, it is contended in support of priority for the federal lien "that no doctrine of relation back can be said to apply to preempt the federal lien" (Government brief, p. 5). In response to the natural inquiry why, we are referred, through circular reasoning, back to *United States* v. *Acri*, 348 U. S. 211 (1955); *United States* v. *Scovil*, 348 U. S. 218 (1955); *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215 (1955).

It appears from this trio of cases that since a federal lien, by force of § 3672, "is not valid as against any mortgagee, purchaser or judgment creditor * * *" the Supreme Court has construed § 3672 to also mean that a lienholder (other than one arising through § 3670) who has not perfected his lien thus fails in qualifying as a "purchaser or judgment creditor" and consequently the federal lien rises to priority irrespective of the time when it attached. We think such reasoning attributes to Congress an intention to

deprive State lienholders of priority contrary to the principle, first in time first in right. The wording of § 3672 makes the federal lien invalid against the three classed exceptions until notice has been filed by the collector.

What actually emerges from this appeal are competing liens, one, the mechanics lien held by a claimant who was neither a mortgagee, purchaser or judgment creditor when the government's liens "arose variously on November 17, 1947, and December 17 and 22 of 1948" (Gov't. brief, p. 2), and, the other, federal liens not sued upon until November 10, 1953. Section 3678,[14] closely resembling the method for reducing an Illinois Mechanic's lien to judgment, provides, *inter alia* that upon the filing of a civil action in a U. S. District Court: (a) "* * * *to enforce the lien* of the United States * * * (b) * * *. All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected * * * shall be made parties to such procedings and be brought into court," and also:

> The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a

[14] 53 Stat. 450, 26 U. S. C. § 3678 (a) (b) (c) (1952).

> distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

Language virtually identical with § 3678 (a), *i. e.*, "to enforce the lien" appears in section 9 of the Illinois statute [15] governing Mechanics' liens—"If payment shall not be made * * * (the) contractor may bring *suit to enforce his* lien * * *." We think both the government and Deutsch had liens and by force of the applicable statutes were, respectively required, to bring suit "*to enforce* (their) liens." Clearly, these two liens simply had different periods of gestation.

By its failure to show that the taxpayer (Fredericks-MacAvoy Brewing) was insolvent, plaintiff brings the problem within the framework erected by this passage from *United States* v. *New Britain*, 347 U. S. 81, 85 (1954):

> When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by § 3466 of the Revised Statutes, 31 U. S. C. (1946 ed.) § 191. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority. Where the *debtor is not insolvent, Congress has failed to expressly provide for federal priority* * * * although the United States is free to pursue the whole of the debtor's property wherever situated. The State, having a lien only upon property within its boundaries, may not reach beyond the

[15] Ill. Rev. Stat. 1953, chap. 82, § 9, S. H. A. chap. 82, § 9.

> state line to fasten its lien upon other property. The *record does not establish that the taxpayer in this case was insolvent.*
>
> It does not follow, however, that the City's lien must receive priority as a whole. *We believe that priority of these statutory liens is determined by another principle of law, namely,* "the first in time is the first in right." [Italics added. Footnotes omitted.]

Since we do not find ourselves barred legislatively from adherence to the principle of time priority enunciated in the *New Britain* case, still unreversed, we will follow it. Of course the most serious deference is to be accorded *Security Trust & Savings Bank, Acri, Liverpool & London Ins. Co.,* and *Scovil* opinions, yet we think in the factual setting presented by the current appeal, the issue of relative priority must yield to the rule reported by Chief Justice Marshall, quoted in *New Britain* and adumbrated by Mr. Justice Story. We are unable to view § 3670 as a citadel for the federal tax lien invulnerable to the time when Deutsch's lien attached to the taxpayer's property. Accord: *United States* v. *Holman,* 206 F 2d 685 (5th Cir. 1953), *United States* v. *Martin,* 168 F. 2d 808 (6th Cir. 1948).

While we think defendant's position resting upon their *lis pendens* argument suggest some merit it is unnecessary to reach that point because the judgment appealed is hereby affirmed.

Affirmed.

APPENDIX I—SYNOPTIC ANALYSIS

NATURE OF, AND AUTHORITY FOR LIENS INVOLVED

NAME OF CASE	DATE DECIDED[1]	ACTION INSTITUTED BELOW	FEDERAL		
			TAX LIEN	STATUTORY AUTHORITY	TYPE OF LIEN
U. S. v. Security Tr. & Sav. Bank, 340 U. S. 47.	Nov. 13, 1950	Quiet title; foreclose mortgage.	Yes	53 Stat. 448, 449 26 U. S. C. §§ 3670, 3671, 3672.	Attachment.[3]
U. S. v. New Britain, 347 U. S. 81.	Feb. 1, 1954	Mortgage foreclosure.	Yes	I. R. C. § 3670 26 U. S. C. (1946 ed.) § 3670, 3671.	City real estate tax City water liens.[3] Judgment of record Two mortgages.
U. S. v. Acri, 348 U. S. 211.	Jan. 10, 1955	Suit for collection of unpaid Federal income taxes; taxpayer defendant.	Yes	(4)	Attachment.
U. S. v. Liverpool & London Ins. Co., 348 U. S. 215.	Jan. 10, 1955	Garnishment—Interpleader.	Yes	None cited.	Garnishment. Attorney's fees.
U. S. v. Colotta, No. 271, U. S. Sup. Ct., [Reported below in 79 So. 2d. 474 (1955)].[6]	Oct. 10, 1955[7]	SEE ORDER ENTERED ON OFFICIAL JOURNAL OF U. S. SUPREME COURT.[8] Suit on mechanics lien.	Yes	§§ 3670, 3671, 3672. 26 U. S. C. 1952 ed.	Mechanic's lien.

1. Mr. Justice Minton wrote the majority opinion unless otherwise indicated.
2. City's liens attached to the specific real estate involved.
3. In U. S. v. New Britain, 347 U. S. 81, 86 (1954), it was stated "*The Security Trust* case involved an *inchoate* attachment lien that had not ripened into a judgment at the time the federal tax lien attached." (Italization appears in original text.)
4. Only § 3672 is cited by the co
5. The Ohio statute received m
lien, 'an execution in advance' . . .
(348 U. S. 211, 213.)
6. Nothing appears in the Court'

IS OF SELECTED CASES DISCUSSED BY PARTIES TO THIS APPEAL.

LVED IN LITIGATION

OTHERS		SUBJECT MATTER CHARGED WITH LIENS	FACTS REFLECTED IN REVIEWING COURTS' OPINION	DECISION AT TRIAL COURT LEVEL	DE
N	STATUTORY AUTHORITY				
	Deering's Cal. Code Civ. Proc. Ann., 1941, §§ 537 & 542.	Purchase price and surplus from proceeds of foreclosure sale.	Oct. 17, 1946, M sued S on unsecured note; attached four parcels realty. Dec. 3, 5, 10, 1946, U. S. filed notices of tax liens in County Recorder's Office. Apr. 24, 1947, M obtained judgment against S. May 2, 1947 M recorded judgment in County Recorder's Office. Suit to quit title commenced by plaintiffs, who purchased one parcel from S. Plaintiffs paid purchase price into court. Three separate mortgage foreclosures on other three parcels. U. S. & M. named parties defendant.	Balance of purchase price, any surplus from foreclosure sales, after mortgages received payment applied: *first* to M's judgment lien, *secondly* for payment federal tax lien.	U. att
ces.[3] d.	Conn. Gen. Stat. 1949, c. 88, § 1853; c. 34, § 758. Conn. Gen. Stat. 1949, c. 34, § 758.	Funds realized through foreclosure judgment sale.	1947 through 1951—City realty taxes due [liens attached as of Oct. 1 or other assessment date of the prior year]. Dec. 1, 1947 to June 1, 1951—City water rent liens arose upon failure to pay. April 26, 1948 to Sept. 21, 1950—Assessment lists received by U. S. Collector of Internal Revenue and federal liens then arose.	Funds available for distribution being insufficient, Conn. Court ordered this priority of payment: (1) Expenses. (2) City liens. (3) Mortgages. (4) Judgment liens. (5) Federal tax lien.	Cit "Pa by fir Jud Sta pri Re
	Ohio. (5)	Funds in federal taxpayer's safety deposit box.	August 6, 1947—O filed suit for wrongful death against A and attached contents of his safety deposit box. Nov. 18, 1947, U. S. Collector of Internal Revenue received assessment lists. Nov. 19, 1947—Demand for payment of taxes served on A. Nov. 21, 1947—Notice of U. S. tax liens filed in Recorder's Office. Aug. 11, 1948—U. S. filed suit in District Court, against A to collect unpaid income taxes. Jan. 19, 1949—O recovered judgment from A.[6]	District Court found the attachment prior to the liens of the United States.	Iss v. S an rea
	None. Rule 677, Vernon's Texas Rules of Civil Procedure.	Proceeds of insurance money payable to taxpayer for fire loss.	Mar. 8, 1952—A's property destroyed by fire subsequently insurance companies agreed on loss. April 8, 1952—Creditor S sued A on an open account and attached funds in carriers' hands due and owing to A. April 21, 1952—Assessment lists for 1948 & 1950 received in office of local Collector of Internal Revenue. April 26, 1952—Notice of Federal tax liens filed in local county clerk's office. Notice of tax liens, warrants of distraint and notice of levy served on insurance company. June 20, 1952—Judgment entered against A in favor of creditor S. Garnishee, insurance company, named government as defendant and requested court's determination of priorities. Case removed to U. S. District Court.	District Court held the lien of garnishee superior to tax liens.	Que U. Tru cas sup 215, tax Rev
	§§ 356 et seq. Miss. Code of 1942.	Real property in hands of taxpayer.[8]	May-June, 1952—Construction contract executed between A, B & C to do work on property in question.[8] May 7, 1952—C mortgaged property to H for loan to pay A and B. Nov. 3, 1952—Work completed; balance owing to A & B. Dec. 5, 1952—U. S. Director of Internal Revenue received assessment list covering C's tax years 1946 to 1949. Dec. 8, 1952—Director filed notice of Federal tax lien with local county clerk. Mar. 26, 1953—A & B sued C to recover judgment under mechanics lien.[9]	Miss. Supreme Court affirmed decision according priority to mechanics lien over Federal tax lien.	"T gra Law

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ntion in this fashion: ". . . the fact that the Ohio courts had designated an attachment and treated it as a perfected lien at the time of attachment, does not bind this Court."

's opinion showing when the Government obtained judgment in its suit against taxpayer.

7. Per Curiam. Mr. Justice Douglas dissenting.

8. The charted facts were drawn from the Mississippi Court's decision.

9. Under the Mississippi Code of 1942 it appears (79 So. 2d 474, 475) that real property tracted and owing, for labor done and materials furnished, and that such debt shall be a lien the contract."

SSED BY PARTIES TO THIS APPEAL.

UBJECT MATTER CHARGED WITH LIENS	FACTS REFLECTED IN REVIEWING COURTS' OPINION	DECISION AT TRIAL COURT LEVEL	DISPOSITION BY U.S. SUPREME COURT
urchase price and surplus from proeds of foreclosure sale.	Oct. 17, 1946, M sued S on unsecured note; attached four parcels realty. Dec. 3, 5, 10, 1946, U. S. filed notices of tax liens in County Recorder's Office. Apr. 24, 1947, M obtained judgment against S. May 2, 1947 M recorded judgment in County Recorder's Office. Suit to quit title commenced by plaintiffs, who purchased one parcel from S. Plaintiffs paid purchase price into court. Three separate mortgage foreclosures on other three parcels. U. S. & M. named parties defendant.	Balance of purchase price, any surplus from foreclosure sales, after mortgages received payment applied: *first* to M's judgment lien, *secondly* for payment federal tax lien.	U. S. tax lien held superior to M's inchoate attachment lien. Reversed.
unds realized through foreclosure dgment sale.	1947 through 1951—City realty taxes due [liens attached as of Oct. 1 or other assessment date of the prior year]. Dec. 1, 1947 to June 1, 1951—City water rent liens arose upon failure to pay. April 26, 1948 to Sept. 21, 1950—Assessment lists received by U. S. Collector of Internal Revenue and federal liens then arose.	Funds available for distribution being insufficient, Conn. Court ordered this priority of payment: (1) Expenses. (2) City liens. (3) Mortgages. (4) Judgment liens. (5) Federal tax lien.	City's liens do not receive priority as a whole. "Priority of these statutory liens is determined by another principle, . . . 'the first in time is the first in right.' " Judgment below vacated and case remanded to State Court "to have determined the order of priority of various liens" per opinion. Remanded.
nds in federal taxpayer's safety posit box.	August 6, 1947—O filed suit for wrongful death against A and attached contents of his safety deposit box. Nov. 18, 1947, U. S. Collector of Internal Revenue received assessment lists. Nov. 19, 1947—Demand for payment of taxes served on A. Nov. 21, 1947—Notice of U. S. tax liens filed in Recorder's Office. Aug. 11, 1948—U. S. filed suit in District Court, against A to collect unpaid income taxes. Jan. 19, 1949—O recovered judgment from A.[6]	District Court found the attachment prior to the liens of the United States.	Issue being "identical with that in United States v. Security Trust Co., 340 U. S. 47 . . . the . . . answer here is the same . . . and for the same reasons." (348 U. S. 211, 213) Reversed.
oceeds of insurance money payable taxpayer for fire loss.	Mar. 8, 1952—A's property destroyed by fire subsequently insurance companies agreed on loss. April 8, 1952—Creditor S sued A on an open account and attached funds in carriers' hands due and owing to A. April 21, 1952—Assessment lists for 1948 & 1950 received in office of local Collector of Internal Revenue. April 26, 1952—Notice of Federal tax liens filed in local county clerk's office. Notice of tax liens, warrants of distraint and notice of levy served on in[illegible]ance company. June 20, 1952—Judgment entered against A in favor of creditor S. Garnishee, insurance company, named government as defendant and requested court's determination of priorities. Case removed to U. S. District Court.	District Court held the lien of garnishee superior to tax liens.	Question of priorities held to be indentical with U. S. v. Acri, 348 U. S. 211, and U. S. v. Security Trust Co., 340 U. S. 47. "On authority of those cases . . . the tax liens of the United States (are) superior to the lien of the garnishee" (348 U. S. 215, 217). Attorneys' fees also denied priority over tax lien. Reversed.
l property in hands of taxpayer.[8]	May-June, 1952—Construction contract executed between A, B & C to do work on property in question.[8] May 7, 1952—C mortgaged property to H for loan to pay A and B. Nov. 3, 1952—Work completed; balance owing to A & B. Dec. 5, 1952—U. S. Director of Internal Revenue received assessment list covering C's tax years 1946 to 1949. Dec. 8, 1952—Director filed notice of Federal tax lien with local county clerk. Mar. 26, 1953—A & B sued C to recover judgment under mechanics lien.[9]	Miss. Supreme Court affirmed decision according priority to mechanics lien over Federal tax lien.	*"The petition for writ of certiorari in this case is granted and the judgment is reversed." 24 U. S. Law Week 3093.

o courts had designated an attachment attachment, does not bind this Court."

d judgment in its suit against taxpayer.

7. Per Curiam. Mr. Justice Douglas dissenting.

8. The charted facts were drawn from the Mississippi Court's decision.

9. Under the Mississippi Code of 1942 it appears (79 So. 2d 474, 475) that real property "shall be liable for the debt contracted and owing, for labor done and materials furnished, and that such debt shall be a lien thereon from the time of making the contract."

LINDLEY, *Circuit Judge*, dissenting. In *United States* v. *Security Trust & Savings Bank, Executor, et al.*, 340 U. S. 47, the Supreme Court was concerned with the question of when a lien attached under an attachment writ under the California code. That statute provided that: "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, * * * and a notice that it is attached, with the county recorder of the county wherein said real property is situate * * *. The attachment * * * shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged * * *." The Court, after commenting that a state court's classification of a lien as specific and perfected, though entitled to weight, when determining priority of federal tax liens, "is subject to reexamination by this Court", saying, at page 50: "The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists." It added: "Nor can the doctrine of relation back—which by process of judicial reasoning merges the atachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a

mere '*caveat* of a more perfect lien to come.' *New York* v. *Maclay,* 288 U. S. 290, 294." I think this case can not be distinguished from the present one. In California the lien of the attachment on real property "attaches and becomes effective" upon the recording of the writ. In Illinois the mechanic's claim of lien likewise becomes effective upon recording it. The reasoning of the *Security* case, it seems to me, is directly applicable to the present case.

In *United States* v. *Acri,* 348 U. S. 211, an attachment writ had issued in Ohio. The court of that state treated the writ as a perfected lien at the time it was filed. This, the Supreme Court said, made the issue identical with that of the *Security Trust* case. "The relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.,* 323 U. S. 353, 356, 357; *Illinois* v. *Campbell,* 329 U. S. 362, 371; *United States* v. *Security Trust Co.,* 340 U. S. 47, 49, always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court. *United States* v. *Waddill Co.,* 323 U. S. 353, at 357; *United States* v. *Gilbert Associates,* 345 U. S. 361." It continued: "Therefore, the fact that the Ohio courts had designated an attachment lien 'an execution in advance', *Rempe & Son* v. *Ravens,* 68 Ohio St. 113, 67 N. E. 282, and treated it as a perfected lien at the time of attachment, does not bind this Court. We must look at the circumstances as we did in the *Waddill* case, where the Virginia court had held a landlord's lien was fixed, specific, and not inchoate." It concluded: "In argument it was pointed out

that the statute of California involved in the *Security Trust* case was different because California courts had held an attachment lien to be inchoate and a mere notice of a more perfect lien to come, while Ohio courts had held it to be an execution in advance and a lien perfected as of the time of attachment. This distinction is immaterial for purposes of federal law. This case is not to be distinguished from *United States* v. *Security Trust Co.,* 340 U. S. 47, and the judgment is *Reversed.*" 348 U. S. at 213, 214.

In *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215, the Court was concerned with the question of relative priority of a garnishment lien, a writ for which had been issued before the Government gave notice of its lien for taxes. The district court held the lien of the garnisher superior to that of the United States. The Court of Appeals affirmed, 209 F. 2d 684. On certiorari, the Supreme Court held that the question of priorities was identical with that in *United States* v. *Acri,* and *United States* v. *Security Trust Company,* and held the tax lien superior to the garnishment.

In *United States* v. *Scovil,* 348 U. S. 218, a landlord had levied a distress lien under South Carolina law before a federal tax lien had attached. The claim was not reduced to judgment until after notice of the federal lien. The Court held that the Government must prevail because of its liens under Section 3670 of the Internal Revenue Code, saying at page 220: "The landlord had a lien other than a mortgage, pledge or judgment lien. As to all other liens, such as the distress lien in the instant case, § 3672 of the Internal Revenue Code affords no protection.

United States v. *Security Trust Co.*, 340 U. S. 47, 51 (concurring opinion). Cf. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 362–365. * * * such a lien was only a *caveat* of a more perfect lien to come, as we have so often held in other cases. *United States* v. *Security Trust Co., supra; United States* v. *Gilbert Associates, Inc., supra; United States* v. *Waddill Co., supra,* at 357–359; *New York* v. *Maclay,* 288 U. S. 290."

In *United States* v. *City of New Britain*, 347 U. S. 81, the question arose as to whether the Government should prevail over certain tax and water service liens of the city. As to the tax liens, the Connecticut statute provided that real estate taxes "shall take precedence over all transfers and encumbrances." The Court held that, though the Supreme Court of Errors, holding that the city's lien was specific and perfected was not conclusive against the federal government, it accepted the holding as to the city's liens, inasmuch as they attached to specific pieces of real property for the taxes assessed. The Court said at page 84: "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—". The Court held that the priority of each statutory lien contested was dependent upon the time when it attached to the property in question and became choate. Citing its earlier opinion in *United States* v. *Security Trust*, it again defined inchoate liens which may become certain as to amount, identity of the lienor, or the property subject thereto only at some subsequent time. The court was dealing with two classes of State and City claims, including real estate tax liens and water-rent liens, and in the end remanded the cause, saying at

page 88: "Under the circumstances, we vacate the judgment of the Supreme Court of Errors of Connecticut and remand the case to that court to have determined the order of priority of the various liens asserted, in accordance with this opinion." The latest case in the Supreme Court is *U. S.* v. *Colotta*, decided October 10, 1955, reversing *U. S.* v. *Colotta*, 79 So. (2) 474, where the Supreme Court of Mississippi had declared a mechanic's lien superior to the federal tax lien. Inasmuch as the notice of a mechanic's lien did not fulfill the requirements necessary to give it priority over the lien of the federal tax fixed by *Illinois* v. *Campbell*, 329 U. S. 363, 371, 375, I think the government should prevail.

The *lis pendens* argument should fail also, I think, for the reason that it is merely an attempt, under a different name, to assert priority of an unperfected lien. See *U. S.* v. *Security Trust & Savings Bank*, 340 U. S. 47.

I would reverse the judgment.

A true Copy:

Teste:

[S] KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

No. 11431

Friday, November 18, 1955

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY AS TRUSTEES, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before Hon. F. RYAN DUFFY, *Chief Judge;* Hon. PHILIP J. FINNEGAN, *Circuit Judge;* Hon. WALTER C. LINDLEY, *Circuit Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *Affirmed.*

APPENDIX B

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862] VALIDITY AGAINST MORTGAGES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

SEC. 3678. CIVIL ACTION TO ENFORCE LIEN ON PROPERTY.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

(b) *Parties to Proceedings.*—All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

(c) *Adjudication and Decree.*—The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court

in respect to the interests of the parties and of the United States.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3678.)

SEC. 3679. CIVIL ACTION TO CLEAR TITLE TO REALTY.

(a) *Obtaining Leave to File—*

(1) *Request for institution of proceedings by United States.*—Any person having a lien upon or any interest in the real estate referred to in section 3678, notice of which has been duly filed of record in the jurisdiction in which the real estate is located, prior to the filing of notice of the lien of the United States as provided in section 3672, or any person purchasing the real estate at a sale to satisfy such prior lien or interest, may make written request to the Commissioner to authorize the filing of a civil action as provided in section 3678.

(2) *Petition to court.*—If the Commissioner fails to authorize the filing of such civil action within six months after receipt of such written request, such person or purchaser may, after giving notice to the Commissioner, file a petition in the district court of the United States for the district in which the real estate is located, praying leave to file a civil action for a final determination of all claims to or liens upon the real estate in question.

(3) *Court order.*—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the real estate shall be made parties.

* * * * *

(c) *Adjudication.*—Upon the filing of such civil action the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 3678. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3679.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U. S. C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U. S. C. 1952 ed., Sec. 3692.)

SEC. 3700. AUTHORITY TO DISTRAIN.

When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate.
(26 U. S. C. 1952 ed., Sec. 3700.)

Federal Rules of Civil Procedure:

RULE 4. PROCESS.

* * * * *

(d) *Summons: Personal Service.*—The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * * * *

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

* * * * *

Illinois Mechanics' Lien Act, 13 Jones Illinois Statutes Annotated and 1934–1949 Cum. Supp.:

tain a brief statement of the contract * * * on which it is founded, the date, when made, and when completed, if not completed, why, and it shall also set forth the amount due and unpaid, a description of the premises which are subject to the lien, and such other facts as may be necessary to a full understanding of the rights of the parties. * * * The plaintiff or petitioner shall make all parties interested, of whose interest he is notified or has knowledge, parties defendant * * *. * * * Parties in interest, within the meaning of this Act, shall include persons entitled to liens thereunder whose claims are not, as well as are, due to the time of the commencement of suit * * *; also all persons who may have any legal or equitable claim to the whole or any part of the premises upon which a lien may be attempted to be enforced under the provisions thereof, or who are interested in the subject matter of the suit. * * *

SEC. 74.13 *Practice—Answer—Counterclaim—Lien for wages—Claimant's affidavit—Subsequent procedure.*—Sec. 13. Defendant shall answer as in other civil actions. The owner may make any defense against the contractor by way of counterclaim that he could in any action of law, and may have the same right of recovery on proof of such in excess of the claim of the contractor against the contractor only * * *. * * * The party making such contest shall file an affidavit which shall state his defense to the allowance of the claim, and the court shall proceed at once to hear the evidence, and determine the merits of the claim * * *.

SEC. 74.14 Sec. 14. *Trails—Parties ready not to be delayed—When court may*

delay order for sale or distribution.—* * * when one creditor shall have obtained a decree or judgment for the amount due, the court may order a sale of the premises on which the lien operates, or a part thereof, so as to satisfy the decree or judgment: *Provided,* that the court may, for good cause shown, delay making any order for sale or distribution until the rights of all parties in interest are ascertained and settled by the court.

SEC. 74.15 Sec. 15. *Preference to laborers—No preference to first contractor.*—Upon all questions arising between different contractors having liens under this act, no preference shall be given to him whose contract was made first, except the claim of any person for wages by him personally performed, shall be a preferred lien.

SEC. 74.16 Sec. 16. *Incumbrances—Apportionment—On improvements made after record of incumbrance—Lien holders have pro rata benefit in what owner pays for—Fraudulent incumbrances—Disposition of.*—No incumbrance upon land, created before or after the making of the contract under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material shall have been satisfied, and upon questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred to the extent of the value of the land at the time of making of the contract, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of

the proceeds of any sale shall be paid to the several parties in interest. * * *

SEC. 74.19 Sec. 19. *Proceeds of sale—Application of pro rata—Labor claims preferred—Deficiency decrees—Excess, to whom paid.*—The court shall ascertain the amount due each lien creditor and shall direct the application of the proceeds of sale to be made to each in proportion to their several amounts, according to the provisions of this act * * *.

APPENDIX C

In the Supreme Court of the State of Washington

[No. 33241. Department One. November 17, 1955]

DON FLEMING, RESPONDENT

v.

BRUCE BROWNFIELD ET AL., DEFENDANTS, UNITED STATES OF AMERICA, APPELLANT

[1] Internal Revenue—Liens—Priority—Determination of Priority.

[2] Courts—United States Courts—Authority of Decisions of State Courts—Construction of State Statutes—Priority of Local Statutory Lien Over Federal Lien.

[3] Internal Revenue—Liens—Priority of Federal Lien Over Mechanic's and Materialman's Lien.

[4] Appeal and Error—Preservation of Grounds—Facts Admitted or Conceded in Lower Court.

Appeal from a judgment of the superior court for Walla Walla county, No. 40576, Bradford, J., entered October 25, 1954, determining that a mechanic's and materialman's lien has priority over Federal tax liens. Reversed in part.

William B. Bantz and *William M. Tugman,* for appellant.

Ringhoffer & Ringhoffer, for respondent.

WEAVER, J. This case presents a problem of priority between a mechanic's and materialman's lien and a tax lien of the United States of America. The Federal lien is based upon unpaid taxes due under the Federal insurance contributions act (26 U. S. C. 1952 ed. §§ 1400–1432) and unremitted withholding taxes. 26 U. S. C. 1952 ed. § 3661.

Between June 22, 1953, and July 29, 1953, plaintiff furnished labor and materials for the construction of a house at the request of defendant Bruce Brownfield.

September 18, 1953, plaintiff filed in the office of the county auditor a claim of lien in the sum of $2,184 against the real property. This lien was filed pursuant to RCW 60.04.060.

October 6, 1953, the United States filed in the office of the county auditor "Notice of Federal Tax Lien Under Internal Revenue Laws," No. 26,587, for "Withholding—FICA Taxes" in the sum of $1,136.01.

November 27, 1953, the government filed another lien, No. 28,016, for $313.70, covering an additional tax period.

Plaintiff commenced this action to foreclose his lien.

The government appeals from the trial court's decree ordering the real property sold and the proceeds, after payment of the cost of sale, applied first to the satisfaction of plaintiff's lien for labor and materials, and then to the satisfaction of the liens of the United States.

Appellant urges the superiority of its liens upon two theories: one, that it is entitled to priority under the provisions of the internal

revenue code (26 U. S. C. 1952 ed. §§ 3670–3672); and two, that it is entitled to priority by reason of the statutory provision which governs debts owed to the United States by an insolvent. (31 U. S. C. 1952 ed. § 191.)

Since appellant's liens filed in the county auditor's office state that they are made "pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code * * *," we direct our attention to a consideration of these statutes.

26 U. S. C. 1952 ed. § 3670. Property subject to lien:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U. S. C. 1952 ed. § 3671. Period of lien:

> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

26 U. S. C. 1952 ed. § 3672:

> Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector.

Since we find it necessary to refer to 31 U. S. C. 1952 ed. § 191 in this opinion, we set forth the pertinent portion of it.

> Whenever any person indebted to the United States is insolvent * * * the debts

> due to the United States shall be first satisfied.

The lien provided by § 3670, *supra,* covers only tax debts; it arises regardless of the solvency of the taxpayer; and it attaches at the time the assessment list is received by the collector.

[1] Although § 3670 creates a lien in favor of the government, it does not confer priority on this lien. As related to other liens, its priority is determined by the principle that:

> "The first in time is the first in right." *United States v. New Britain,* 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 (1954).

Copies of appellant's liens were admitted in evidence by stipulation of counsel that they were

> * * * copies of the liens filed [in the office of the county auditor] by the United States Government on the dates shown in the lower left hand corner of each one of them, one being filed November 27, 1953 and the other being filed October 6, 1953.

We find no evidence in the record before us to support appellant's claim that the assessment upon which its lien No. 26,587 is based was received by the collector on September 3, 1953. Hence, appellant's lien is not entitled to priority by reason of § 3671, *supra.* However, since it was necessary that the collector receive the assessment list from the commissioner before it could be filed in the office of the county auditor, we will accept the date of filing as the date the list was received. See 26 U. S. C. 1952 ed. §§ 3640–3641.

Patently, respondent is not a "mortagee, pledgee, purchaser, or judgment creditor," as enumerated in § 3672, *supra.* Since his lien was

filed in the county auditor's office eighteen days before appellant's lien was filed, its priority depends upon the principle of "first in time," provided it meets the criteria of those liens entitled to priority.

[2] Our characterization of the lien for labor and materials, as specific and perfected at a given time, is controlling in all matters in which the laws of this state are paramount. However, a different rule applies when a Federal statute is involved. Although the supreme court of the United States was speaking of the priority of a lien claimed by reason of the statutory provision which governs debts owed to the government by an insolvent (31 U. S. C. 1952 ed. § 191), it said:

> It is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority. *United States* v. *Waddill, Holland & Flinn,* 323 U. S. 353, 89 L. Ed. 294, 65 S. Ct. 304 (1945).

Prior to 1950, numerous Federal lower courts had denied the supremacy of Federal tax liens under § 3670 over antedating rival liens for county taxes, contingent right of set off, equitable

lien or right of set off, garnishments, local tax liens, landlord's lien, attachment liens, wage assignments, and the like. In at least three cases, mechanics' and materialmen's liens which had been recorded pursuant to state statutes were held to have priority over antedating Federal liens under § 3670, *supra*. *In re Taylorcraft Aviation Corp.*, 168 F. (2d) 808 (C. C. A. 6th; 1948); *In re Caswell Constr. Co.*, 13 F. (2d) 667 (N. D. N. Y.; 1926); *The River Queen*, 8 F. (2d) 426 (E. D. Va.; 1925).

In the *Taylorcraft* case, *supra*, the circuit court recognized that the security had been enhanced by labor and material for which the lien was claimed; and that it would be in the nature of unjust enrichment to permit its defeat by a lien subsequent in time.

In *United States* v. *Security Trust & Sav. Bank.*, 340 U. S. 47, 95 L. Ed. 53, 71 S. Ct. 111 (1950), the creditor's attachment lien and subsequent judgment straddled the date of the Federal tax lien. Under the California statute, the creditor's attachment gave rise to a lien on the realty, effective when recorded. The California court had previously held that a subsequent judgment lien merged with the attachment lien and related back to the time when the attachment lien was recorded.

No question of insolvency being involved, the lien asserted by the government stemmed from 26 U. S. C. 1946 ed. §§ 3670–3672, quoted *supra*.

The court relied upon a decision of the supreme court of California, wherein it is stated:

"The attaching creditor obtains only a potential right or a contingent lien." *Puissegur* v. *Yar-*

brough, 29 Cal. (2d) 409, 412, 175 P. (2d), 830 (1946).

The United States Supreme Court said:

> Examination of the California statute shows that the above is an apt description. The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.
>
> Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere "*caveat* of a more perfect lien to come." *New York* v. *Maclay,* 288 U. S. 290, 294.

After quoting the statutes we are considering, the court continued:

> In cases involving a kindred matter, *i. e.,* the federal priority under R. S. § 3466 [31 U. S. C. 1952 ed. § 191], it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell, supra,* 374 [329 U. S. 362, 97 L. Ed. 1076, 73 S. Ct. 705 (1946)] If the

Security Trust & Sav. Bank, supra, holding that a tax lien of the United States is entitled to priority over an Ohio attachment lien when the Federal tax lien was recorded subsequent to the date of the attachment lien, but prior to the date the attaching creditor obtained judgment. *United States v. Acri,* 348 U. S. 211, 99 L. Ed. 193, 75 S. Ct. 239 (1955).

United States v. Liverpool & London & Globe Ins. Co., supra, shared the same fate. The United States supreme court reversed the circuit court and held that Federal tax liens are entitled to priority over a Texas garnishment lien when the tax liens are recorded subsequent to the date of the garnishment lien, but prior to the date the garnishor obtained judgment. *United States v. Liverpool & London & Globe Ins. Co.,* 348 U. S. 215, 99 L. Ed. 195, 75 S. Ct. 247 (1955).

United States v. Scovil, 348 U. S. 218, 99 L. Ed. 197, 75 S. Ct. 244 (1955). Although the debtor was insolvent, the supreme court found it unnecessary to pass upon the effect of 31 U. S. C. 1952 ed. § 191. Under 26 U. S. C. 1952 ed. §§ 3670-3672, it held that a landlord's lien under the statutes of South Carolina "was only a caveat of a more perfect lien to come, as we have so often held in other cases."

Our statute requires that one claiming a lien for labor and materials commence an action to enforce the lien within eight calendar months after the notice of lien is filed. RCW 60.04.100. In such an action, the owner of the property may, and often does, dispute the amount of the lien. In the instant case, the recorded lien is for $2,184. After trial, the lien was reduced to $2,124.

[3] In so far as it is necessary in this case to determine the priority of our statutory mechanic's and materialman's lien (authorized by RCW 60.04.060) and a subsequent attaching lien of the Federal government (under 26 U. S. C. 1952 ed. §§ 3670–3672 and 31 U. S. C. 1952 ed. § 191), we are constrained to hold, in view of the authorities we have discussed, that respondent's lien was not specific and perfected under Federal law at the time Federal tax lien No. 26,587 attached to the property, and hence, is inferior to it.

[4] On trial of this action, the government conceded that respondent's lien was superior to Federal tax lien No. 28,016. A party, including the United States, cannot urge error on a ruling or judgment made with express or implied consent. *United States v. Star Constr. Co.,* 186 F. (2d) 666 (C. A. 10th; 1951).

In view of the negotiations between the internal revenue agent and the debtor concerning his failure to pay his taxes, we believe the evidence is sufficient to warrant a finding that demand for payment of taxes was made.

Our attention is directed to several decisions of this court. *In re Carroll Constr. Co.,* 41 Wn. (2d) 317, 249 P. (2d) 234 (1952); *Spokane Merchants' Ass'n v. State,* 15 Wn. (2d) 186, 130 P. (2d) 373 (1942); *Palace Fish & Oyster Co. v. Bean,* 32 Wn. (2d) 56, 200 P. (2d) 753 (1948); and *Ernst v. Guarantee Millwork,* 200 Wash. 195, 93 P. (2d) 404 (1939).

In the *Carroll* case, we held that a lien for taxes on personal property was specific and perfected when the director of the state's employment security department caused notice of lien to be

filed with the county auditor and took priority over a tax lien of the Federal government which attached subsequently. The United States supreme court granted a writ of *certiorari* and vacated the judgment. The case was remanded "for consideration in the light of *United States v. Gilbert Associates,* 345 U. S. 361." United *States* v. *Carroll Constr. Co.,* 346 U. S. 802, 98 L. Ed. 333, 74 S. Ct. 22 (1953).

With one exception, the other cases involve priority between various state statutory liens for taxes and the Federal tax lien. The instant case involves only the priority of the mechanic's and materialman's lien under RCW 60.04.060. Our decision is limited thereto.

In the *Ernst* case, *supra,* an individual was held to have a specific lien for labor under Rem. Rev. Stat., §§ 1149 and 1153 (*cf* RCW 60.32.010; RCW 60.32.050). This court held that she was entitled to priority over the government's lien for taxes under U. S. Rev. Stat. § 3466 (31 U. S. C. 1952 ed. § 191). In view of the recent decisions of the United States supreme court which we have analyzed, the *Ernst* case may no longer be authority for this principle.

That portion of the decree granting priority to the lien of respondent over lien No. 26,587 of the United States is reversed. Upon foreclosure of the liens and sale of the property, the proceeds therefrom shall be applied first, to costs of selling said property; second, to payment of that portion of appellant's judgment against the debtor represented by lien No. 26,587; third, to payment of respondent's judgment; and fourth, to payment

of that portion of appellant's judgment against the debtor represented by lien No. 28,016.

It is so ordered.

HAMLEY, C. J., SCHWELLENBACH, DONWORTH, and OTT, JJ., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
Respondents.

BRIEF OF THE RESPONDENTS, WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

KENNETH F. BURGESS,
EDWARD P. SALTIEL,
WILLIAM H. AVERY, JR.,
GEORGE RAGLAND, JR.,
HENRY A. PRESTON,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for White Bear Brewing Co. and Chicago Title and Trust Co., as Trustee, Respondents.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

THE BUNTINGDP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
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BRIEF OF THE RESPONDENTS, WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The District Court's memorandum opinion, which is not reported, is printed as Appendix A, *infra*, pp. i-v. The opinion of the Court of Appeals for the Seventh Circuit is published at 227 F. (2d) 423 and is printed in Appendix A of the Petition for Certiorari (pp. 1a-29a).

Both the District Court and the Court of Appeals held that under the facts of this case the mechanic's lien here involved was specific and choate when it was recorded and that it was therefore entitled to priority over the federal

tax liens which arose subsequently, under the doctrine of *United States* v. *New Britain*, 347 U. S. 81 (1954), that "first in time is first in right."

The District Court also held that the maintenance of the present suit by the United States was precluded by the doctrine of *lis pendens* and the rule of the immunity of completed judicial proceedings from collateral attack in a subsequent suit. The Court of Appeals found it unnecessary to reach this second point because of its decision as to priority, but stated that the respondents' arguments "suggest some merit."

QUESTIONS PRESENTED.

The issue is whether the United States by this case can take real property away from those who previously purchased it and made a mortgage loan on it in good faith reliance on title coming through a mechanic's lien foreclosure and sale, and have the property resold to satisfy federal tax liens that arose after the recording of the mechanic's lien and during the pendency of the foreclosure suit.

The Petition for Certiorari incorrectly states that the question is "whether liens for unpaid federal taxes • • • are superior to an inchoate mechanic's lien." (p. 2) That statement assumes that the mechanics' lien was inchoate when the tax liens arose, whereas the mechanic's lien in this case was recorded as a specific and choate lien *prior* to the time when the tax liens arose. Furthermore, the Petition for Certiorari does not discuss the issues of the applicability of the rules of *lis pendens* and *collateral attack* which were raised in the District Court and Court of Appeals below.

On the matter of priority, the question really is:

1. *Whether federal tax liens are entitled to priority over a previously recorded mechanic's lien.*

This involves a consideration of the holding of both Courts below that the mechanic's lien was specific and choate when recorded.

On the matter of the rules of *lis pendens* and *collateral attack*, the question is:

2. *Whether the United States, in a new suit filed long after the respondents acquired title to real property coming through a mechanic's lien foreclosure decree and sale, can collaterally attack the foreclosure decree previously entered in a state court proceeding which was pending when the federal liens for taxes against the property first arose.*

The answer to this second question constitutes an independently sufficient reason why the decision of both courts below is correct.

STATUTES INVOLVED.

Of the many sections of the Internal Revenue Code listed in the Petition for Certiorari as "Statutes Involved" (pp. 2, 31a-35a), Sections 3670 and 3671 are the only sections which have a bearing on this case; and they are the only sections mentioned in the body of petitioner's argument. These sections provide that the United States shall have a lien for unpaid taxes "upon all property and rights to property" of the taxpayer, and that "the lien shall arise at the time the assessment list was received by the collector." Sections 3672, 3678, 3679, 3690, 3692 and 3700 have no bearing on the case.[1]

The petitioner no longer relies, as it did in the courts below, on Section 3466 of the Revised Statutes (31 U. S. C. Sec. 191) pertaining to insolvent debtors. That statute does not apply, since the taxpayer was not insolvent (Opinion below, p. 16a of Petition).

The Illinois Mechanics' Lien Act, Ill. Rev. Stats. (1955),

[1] Section 3672 of the Code is inapplicable: it provides that the tax lien, even after it has arisen, shall not be valid against certain persons until it has been recorded; that section does not affect persons acquiring interests or liens *before* the tax lien arose (as in the present case). Section 3678 provides that the Attorney General may file a civil action to enforce a tax lien against a taxpayer's property, but that section does not purport to determine any of the questions involved in this case. Section 3679 and Rule 4 of the Federal Rules of Civil Procedure are also inapplicable: they set forth the procedures by which a private lienor may file a civil action to clear title to realty against which the United States had previously filed its notice of tax lien; obviously they do not apply to a private lienor who has filed his civil action (such as the mechanic's lien foreclosure suit here) not only prior to the filing of the federal tax liens but even before any federal tax lien existed. Sections 3690, 3692 and 3700 are inapplicable: they provide for distraint and sale of property of a delinquent taxpayer; no such procedure is involved in this case; and these sections do not purport to authorize the elimination of pre-existing liens.

Ch. 82 (pp. 36a-40a of Appendix B to the Petition), and particularly Section 7 (p. 36a) which provides for recording of the lien, is also involved, as well as the Illinois *lis pendens* statute, Ill. Rev. Stats. (1955), Ch. 22, Sec. 53 (which is printed in Appendix B, *infra*, p. vi).

STATEMENT OF THE CASE.

The Statement in the Petition for Certiorari is inaccurate and deficient in several important respects. The respondents, White Bear Brewing Co., Inc. and Chicago Title and Trust Company, as Trustee, are not transferees from the taxpayer, Frederick's Brewing Co. (also known as McAvoy Brewing Company) as stated in the Petition for Certiorari (p. 2). The taxpayer was a former owner of the real property in question, whose interest in the property had been wiped out by the mechanic's lien foreclosure proceeding which had been instituted before the tax liens of the United States arose. Respondent White Bear Brewing Co. later purchased the property in good faith for value ($36,000) from a person who had acquired his title from the grantee under the master's deed issued pursuant to the foreclosure sale, all long before petitioner filed this suit to resell the property in satisfaction of its tax liens. Respondent Chicago Title and Trust Company is the trustee under a first mortgage trust deed, also taken in good faith for value ($31,000) at the time of the purchase of the property by respondent White Bear Brewing Company. Frederick's Brewing Company (the taxpayer which lost its title by foreclosure), the mechanic's lien holder and the intervening title holders have no present interest in the property and are not parties to this appeal.

The chronology of events is very important in this case. It is accurately stated in a table at the outset of the opinion of the Court of Appeals (pp. 2a-6a of Appendix A to Petition). Because of its very great significance to a correct determination here, a brief summary from that table is printed below:

May 19, 1947 — Work completed pursuant to contract between mechanics' lien claimant and taxpayer for improvements to the realty in question.

September 2, 1947—Mechanics' lien recorded. It contained all specific details of the lien, including the name of the lienholder, the legal description of the real estate and the amount of the lien ($8,286.00, plus interest).

November 13, 1947—Suit for foreclosure of mechanics' lien filed in Circuit Court of Cook County, Illinois (summons served on taxpayer November 15, 1947).

November 17, 1947—Assessment list for first of several federal taxes received by the U. S. Collector, First District, Illinois.

December 16 and 29, 1948—Tax liens aggregating $16,217.46 recorded.

April 28, 1949—Decree of foreclosure and sale entered in mechanics' lien suit. Tax liens aggregating $7,922.01 recorded.[2]

June 28, 1949—Foreclosure sale held and property sold at public auction.

September 22, 1949—Certificate of foreclosure sale issued and recorded.

September 30, 1949—Foreclosure sale approved by Court.

September 28, 1950—Master's deed issued to assignee of certificate of sale (no redemption having been made within the statutory period of 15 months).

November 2, 1950—Master's deed recorded.

July 22, 1952—Deed to respondent White Bear Brewing Co., Inc., and purchase-money mortgage to re-

[2]The record does not indicate the time of entry of the foreclosure decree. The tax lien was recorded at 4:44 p. m. (R. 12).

spondent Chicago Title and Trust Company, as trustee, recorded.

November 10, 1953—The present suit filed in the District Court below seeking to have the property resold in satisfaction of federal tax liens.

The Court of Appeals made the very pertinent observation on the precise factual situation existing in the present case as follows:

> "This appeal reflects several singular distinguishing characteristics in contrast with the cases [relied on by petitioner]: (i) the mechanic's lienholder acquired, recorded and commenced his foreclosure suit before the first relevant assessment list was received by the U. S. Collector, (ii) the property involved has long since left the taxpayer's hands and MacAvoy Brewing Co. is completely divested of any title or interest, (iii) the government did not participate, in any manner, in the Illinois Mechanic's lien foreclosure proceedings despite Deutsch's prior recordation of his lien." (Page 20a, Appendix A of Petition.)

ARGUMENT.

I. THE DECISION BELOW IS IN STRICT ACCORD WITH THE DECISIONS OF THIS COURT AS TO THE RELATIVE PRIORITY OF FEDERAL TAX LIENS AND OTHER LIENS.

A. The Courts Below Correctly Held that the Previously Recorded Mechanic's Lien Was Entitled to Priority over the Subsequent Federal Tax Liens, in Conformity with the Decision of This Court in United States v. New Britain, 347 U. S. 81 (1954).

After carefully reviewing the facts of this case, the Court of Appeals concluded that:

> "It is quite clear that the only way the government can prevail on these facts is to have us reject the rule, 'the first in time is the first in right,' reiterated by Mr. Justice Minton in *United States* v. *New Britain*, 347 U. S. 81, 85 (1954)." (Petition for Certiorari, Appendix, p. 21a.)

In the *New Britain* case, this Court considered the relative priority of federal tax liens and municipal tax and water-rent liens. This Court noted that the taxpayer was not insolvent, and the nub of its decision was stated by Mr. Justice Minton in the following words:

> "* * * the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States. The statute creating the federal liens here involved, I. R. C. §3670, does not in terms confer priority upon them. * * *
>
> "We believe that priority of these statutory liens is determined by another principle of law, namely, '*the first in time is the first in right.*' * * * This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 Am. Jur., Liens, § 33; 53 C. J. S., Liens, § 10b. We think that

> Congress had this cardinal rule in mind when it enacted § 3670, a schedule of priority not being set forth therein. Thus, *the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate.*" (347 U. S., at 84-86, emphasis added.)

Holding that some, but not all, of the water-rent and tax liens "attached to the property and became choate prior to the attachment of the federal tax liens," this Court remanded the case for determination by the lower court of the times when the various competing liens had in fact attached. (347 U. S., at 86, 88.)

Applying the rule of the *New Britain* case to the facts in the present case, the mechanic's lien is entitled to priority over the federal tax liens if the mechanic's lien "attached to the property in question and became choate" before the federal tax liens arose. It is conceded by petitioner that the mechanic's lien attached to the property on September 2, 1947 (when the mechanic's lien was recorded in strict compliance with the Illinois Mechanic's Lien Act), more than two months before the first of the federal tax liens arose on November 17, 1947 (when the first of the tax assessment lists were received by the collector of Internal Revenue). (Petition for Certiorari, p. 3). Therefore, in this case the priority issue turns upon the question as to whether the mechanic's lien was choate when the federal tax liens arose (as the District Court and Court of Appeals held) or was then inchoate (as the Petition for Certiorari contends, pp. 2, 10). In petitioner's reply brief (p. 1) in the Court below, it candidly stated that the priority issue was simply this: "At what point in time should a mechanic's lien arising under the Illinois Act be considered fully perfected or choate as against a federal tax lien"?

The test as to when a lien becomes "choate" and "per-

fected" was stated by this Court in the *New Britain* case as follows:

> "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." (347 U. S., at 84.)

In the present case, the mechanic's lien met these requirements and was "choate" when the lien was recorded on September 2, 1947, inasmuch as the recorded lien specified the lienor (Fred W. Deutsch), the property subject to the lien (the real estate here involved, by its legal description) and the amount of the lien ($8,286, with interest). The mechanic's lien in the present case was therefore "choate" and "perfected," just as were the liens involved in the *New Britain* case.[3]

Petitioner concedes that the mechanic's lien specified the lienor and the property subject to the lien, but contends that the amount of the lien was uncertain until the entry of a foreclosure decree, pointing out that the decree in this instance was for an amount greater than the amount specified in the recorded lien notice. Apparently petitioner overlooks the fact that the decree properly included

[3] While recognizing that the question of "choateness" of the mechanic's lien is a question of federal law, the Courts below further noted that the Illinois courts have held that an Illinois mechanic's lien is "perfected," "choate," and "consummate," once it has been recorded, as was done in this case. *Donn* v. *Auto Dealers Investment Co.*, 318 Ill. App. 95, 108 (1943); *Robertson* v. *Huntley & Blazier Co.*, 351 Ill. App. 378, 384 (1953); *Schoenberg Mfg. Co.* v. *Broadway Hotel Corp.*, 259 Ill. App. 40, 42 (1930); *United Cork Companies* v. *Volland*, 365 Ill. 564, 573 (1937). In both *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, and *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555, cited by petitioner, the federal lien arose *before* the mechanic's lien was recorded and any references there to the status of the lien prior to recording are obviously inapplicable here where the federal lien arose *after* the mechanic's lien had become choate and perfected upon recording.

not only the principal amount specified in the lien notice but also interest, fees and costs. Moreover, in *Illinois* v. *Campbell*, 329 U. S. 362 (1944), which first set forth the threefold test of "choateness" reiterated in *New Britain*, this Court held that an error in computing the amount of the lien does not make it uncertain or indefinite or prevent the lien from meeting that particular requirement of choateness. This Court said:

> "It is true that the filing of notice of lien determined the amount of the lien, though the state may have computed wrongly the amount of taxes owed it. * * * The latter (notices of lien) also fixed the amounts of the liens, though miscalculated." (329 U. S., at 372, 375)[4]

Hence even if the amount of the mechanic's lien had been miscalculated when the lien was filed (of which there is no evidence in the present case), the lien would have been choate.

Petitioner bases its case primarily on the contention that the mechanic's lien is "inchoate" until a judgment is entered enforcing the lien. In support of this contention, petitioner argues (Petition, p. 9) that "until a judgment was obtained, the mechanic's lien was not enforceable in any particular amount;" that "the mere filing of a mechanic's lien, or of a suit for its enforcement, does not of itself determine the correctness or the amount of the lienor's claim" (despite the fact that the mechanic's lien specified that it was for the amount of $8,286, with interest, under the written contract between the parties); that the "statute permits the property owner to interpose any defense to the suit" and "permits any other lien claimant to contest the mechanic's lienor's claim;" and

[4] In *Illinois* v. *Campbell*, the Court found that the state liens were inchoate, not because the amount lacked certainty, but because "neither the notices of lien nor the appointment of the receiver made definite and certain the property." (329 U. S., at 375).

that "only after the creditor has obtained a decree or judgment is the court empowered to order a sale of the property against which the lien is asserted."

Yet the same comments could be made about the liens in the *New Britain* case, and particularly about the water-rent liens there involved: until a judgment is obtained in a foreclosure suit, such liens are not enforceable;[5] the filing of the lien, or of a suit for its enforcement, does not of itself determine the final correctness or amount of the municipal claim any more or any less than does the filing of the mechanic's lien or of a suit for its enforcement (both municipal liens and the mechanic's lien being definite in amount, subject to correction in a suit for enforcement, as in the foreclosure of a mortgage lien); a property owner or other interested party is permitted to interpose any defense or other "equitable obstacle" in the suit to foreclose the municipal lien;[6] and only after the lienholder has obtained a decree is the court empowered to order a sale of the property against which the lien is asserted.[7] In view of these facts, petitioner would apparently contend, and it did contend in the *New Britain* case,[8] that the municipal liens for water-rent and taxes were inchoate and would have continued to be inchoate until the entry of a judgment enforcing the

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[5] Connecticut General Statutes (1949), Chap. 34, Sec. 758; Chap. 88, Sec. 1863. The remedy of levy and sale is not available for the collection of water-rents. While that remedy is available for the collection of municipal taxes, that fact is not a basis for distinction even between such taxes and a mechanic's lien, inasmuch as levy and sale are not an enforcement of the tax lien against the specific property covered by the lien but are a separate remedy for the collection of the taxes which must be pursued first against *personal property* of the taxpayer before the real property can be reached. Conn. Gen. Stats. (1949), Chap. 88, Sec. 1836.

[6] *City of Bridgeport* v. *Equitable Title & Mortgage Co.*, 106 Conn. 542, 551, 138 Atl. 452, 456 (1927).

[7] Connecticut General Statutes (1949), Chap. 88, Sec. 1863.

[8] Brief for the United States in the *New Britain* case (Docket No. 92, October Term 1953), esp. pp. 7-8.

liens. However, this Court held otherwise; it held that the municipal liens, upon which no foreclosure suit had even been filed and no "judgment" had been entered, "attached to the specific property and became choate prior to the attachment of the federal tax liens." (347 U. S. at 86.)

The holding of this Court in the *New Britain* case is directly applicable to the facts in the present case. Under this holding, the previously recorded mechanic's lien "attached to the specific property and become choate prior to the attachment of the federal tax liens," and the priority of these liens is determined by the principle of law that "the first in time is the first in right."

B. The Courts Below Correctly Found that United States v. Security Trust & Savings Bank, 340 U. S. 47 (1950) and the Other Cases Involving Attachment and Similar Liens Were Inapplicable to the Facts of This Case.

The principal reason urged by petitioner for granting the writ is petitioner's contention that the decision below "departs from the rule laid down" by this Court in the *Security Trust* case and the recent cases which follow it.[9]

The Court of Appeals held that those decisions were not applicable "in the factual setting presented by the current appeal," and that instead the rule of *first in time, first in right* "reported by Chief Justice Marshall, quoted in *New Britain* and adumbrated by Mr. Justice Story" was applicable. (p. 24a of Appendix A to Petition.)

A contention similar to petitioner's present argument

[9] *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Scovil*, 348 U. S. 218. The *Scovil* case involved a landlord's lien which did not arise until *after* the federal tax liens had attached to an *insolvent* taxpayer's property; therefore that case is not relevant here.

was rejected by this Court in the *New Britain* case where the Court stated:

> "The United States in claiming priority for all its liens relies heavily on two recent cases from this Court, *United States* v. *Security Trust & Savings Bank, supra,* and *United States* v. *Gilbert Associates,* 345 U. S. 361. We do not think they are inconsistent with our decision in this case." (p. 86 of 347 U. S.)[10]

In contrast to the *New Britain* water-rent and tax liens which were choate because they met the threefold test of "choateness" before the federal tax liens arose, this Court expressly distinguished the attachment lien involved in the *Security Trust* case which failed because it was inchoate:

> "Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date of federal liens attach and cannot hen be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined. Accordingly, we concluded in *Security Trust* 'that the tax liens of the United States are superior to the inchoate attachment lien * * *' *Id.,* at 51." (347 U. S. at 86-7.)

The nature of a statutory lien is determined by the statute which creates it. If the statute makes the lien contingent on any subsequent event, such as the outcome of another suit, the lien remains inchoate until that event takes place. This Court recognized that fact as controlling in the *Security Trust* case when it pointed out that the California attachment statute enabled a claimant to have

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[10] The *Gilbert Associates* case is inapplicable here in any event because it dealt with an insolvent taxpayer.

the property of his debtor attached at any time "as security for the satisfaction of any judgment that *may* be recovered." (340 U. S. at 49.)[11] Similarly in the *Acri* case, which involved an attachment ancillary to a suit for damages for wrongful death, the Court said:

> "We hold here that the attachment lien in Ohio is an inchoate lien because, at the time the * * * attachment issued, the fact and the amount of the lien were contingent upon the outcome of the suit for damages." (348 U. S. at 214.)

The *Liverpool* case involved a garnishment lien which, like the attachment lien, was merely in aid of, ancillary to, and contingent upon the outcome of the principal suit involving an independent cause of action unrelated to the property subject to the lien.

On the other hand, the lien created by the Illinois Mechanic's Lien Act is an entirely different kind of lien. It possesses its own vitality and stands on its own feet. It is fixed and definite when recorded and its existence is not contingent upon any subsequent event whatsoever. It is not in aid of, ancillary to, or contingent upon the outcome of a principal suit upon an independent cause of action. The foreclosure suit is for the enforcement of an existing and choate lien just as this Court in the *New Britain* case held that the municipal liens were choate before enforce-

[11] Having thus found that the attachment lien in the *Security Trust* case was "inchoate" and "contingent upon a judgment," the Court stated that the attaching creditor could not be accorded the status of a judgment creditor retroactively by any "relation back" of the judgment lien to the date of the attachment. Respondents have never contended that the mechanic's lienor had the status of a judgment creditor before the entry of the foreclosure decree, nor have they argued for any "relation back." They have contended, and now contend, that each event was effective on the date of its actual occurrence: the mechanic's lien became choate when it was recorded; the foreclosure suit became *lis pendens* when it was commenced; and the foreclosure decree became immune from collateral attack when it was entered.

ment in a foreclosure suit. "It is a mistake to suppose that the court creates or confers the lien by its decree. The court only finds and declares that it was in existence." *Clark* v. *Moore*, 64 Ill. 273, 279 (1872).

There are sound reasons of equity and of public policy for these statutory liens of materialmen and laborers who improve the very property on which they are given a lien. The policy of the law has long been to encourage the prompt payment of debts to wage earners, laborers and materialmen. The property to which the mechanic's lien attaches stands improved and enhanced in value to the extent of the lien, and it would result in unjust enrichment to make that lien contingent or to make it possible for any person who acquires an interest in the property subsequently, including the tax collector, to realize upon the benefits of the mechanic's labor and materials to the detriment of the mechanic himself. No such reasons exist in the case of attachment and garnishment liens, and the cases involving such liens are not controlling in the present case.

C. The Decision Below Is Consistent With the Decisions of This Court and Courts of Appeals Involving the Relative Priority of Mechanics' Liens and Federal Tax Liens.

The only case in this Court which involved the relative priority between a federal tax lien and a mechanic's lien is *United States* v. *Colotta*, 350 U. S. 808 (*per curiam*, 1955). In that case the government's unopposed petition for certiorari (p. 2) stated that the "Question Presented" was:

> "Whether a lien of the United States for unpaid federal taxes, arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939, is superior to a statutory mechanic's lien accorded by state law to con-

> tractors, laborers and materialmen, where the contract giving rise to the mechanic's lien had been performed *but no steps had been taken to file or enforce such lien before the federal lien arose and was recorded.*" [Emphasis supplied.]

Thus when the federal lien attached, the mechanic's lien had not become "choate" under the threefold test in *New Britain*,[12] inasmuch as no notice had been recorded establishing the identity of the lienor, the property subject to the lien and the amount of the lien. Furthermore, as the government's petition for certiorari in that case (p. 14a, Appendix A of present Petition) pointed out: "respondents had neither recorded their contracts • • • nor filed the *lis pendens* notice". Hence, the vital facts in the *Colotta* case were precisely the reverse of the facts in the present case in which the mechanic's lien was recorded before the federal tax liens arose and the foreclosure suit to enforce that lien had been commenced before, and was pending when, the federal tax liens arose.

In *United States* v. *Kings County Iron Works*, 224 F. (2d) 232 (C. A. 2, 1955), as in the *Colotta* case, the federal tax lien attached before the mechanic's lien was recorded, and was therefore held to be entitled to priority under the rule that the "first in time is first in right."[13]

However, in *United States* v. *Albert Holman Lumber Co.*, 206 F. (2d) 685 (C. A. 5, 1953), the Court of Appeals for the Fifth Circuit considered the relative priority of a federal tax lien and a *previously* recorded mechanic's lien. The Court held that the mechanic's lien was entitled to priority. In that case the government advanced substantially the same arguments as it relies upon in its petition in the present case. In overruling those arguments, the Court said:

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[12] 347 U. S. 81, 84.

[13] To the same effect is *U. S.* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 Atl. (2d) 81 (1953).

> "In this case the United States first argues that under the law of Alabama the liens of the appellees were inchoate and that therefore we may reverse the judgment on this basis. More specifically it argues that no complete and specific liens attach to the property under the state law until judgment is entered establishing the liens. Restating the same argument in different words, the Government asserts that until the court or the jury finds the existence of a materialman's lien, no right against or interest in the property has been established. We do not at all agree.
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> "Under the law of Alabama, * * * the liens of mechanics and materialmen attach from the commencement of the building or improvement * * *. Such liens are subject, however, to be defeated and lost if the claims are not verified and filed * * *. After verification and filing their liens were complete * * *." (206 F. (2d) at 688.)

In denying rehearing, the Court rejected the contention that the *Security Trust* decision[14] was applicable to the facts of the case, saying that whereas the attachment lien in the *Security Trust* case was "contingent",

> "In the instant case a different situation is presented in that the Government here claims that its general tax lien is entitled to priority over appellee's materialmen's liens which were specific and perfected under Alabama law long before the federal lien arose." (208 F. (2d) at 114.)

Therefore, the Court of Appeals for the Fifth Circuit held in the *Holman* case, as did the Court below in the present case, that the recorded mechanic's lien was entitled to priority over subsequently arising federal tax liens.[15] Pe-

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[14] 340 U. S. 47.

[15] To the same effect are the decisions in *In re Caswell Constr. Co.*, 13 F. (2d) 667 (D. C., N. D. N. Y., 1926) and *Great American Indemnity Co.* v. *U. S.*, 120 F. Supp. 445, 450-1 (D. C., W. D. La., 1954), in which the Court said: "In the Security Trust case it was held the attachment was really not a lien at all but merely

titioner has not cited any contrary decision of a Court of Appeals, involving a mechanic's lien recorded before federal liens attached, and we have found none.[16]

It is therefore apparent that all decisions of this Court and Courts of Appeal, involving the relative priority of mechanics' liens and federal tax liens, are entirely consistent with the decisions of the courts below holding that a recorded mechanic's lien is entitled to priority over a subsequent federal tax lien.[17]

II. THE TITLE OF THE RESPONDENTS TO THE PROPERTY INVOLVED IS PROTECTED BY THE DOCTRINE OF LIS PENDENS AND THE RULE AGAINST COLLATERAL ATTACK WHICH PRECLUDE THE RELIEF SOUGHT AND CONFIRM THE CORRECTNESS OF THE DECISION BELOW.

Petitioner's tax liens arose not only after the mechanic's lien was recorded, but also after the mechanic's lien fore-

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a right to perfect a lien. The Louisiana lien is a perfect lien with a right to reduce to a perfect judgment. Because they are not judgments they gain no special standing by Section 3672—but because they are choate liens they would be entitled to priority if recorded prior to the federal tax liens."

[16] The Supreme Court of Washington reached a contrary result in *Fleming* v. *Brownfield*, decided November 17, 1955 (1956 C. C. H. par. 9138, reprinted in Appendix C of Petition for Certiorari, pp. 41a-53a), by an erroneous application of principles which this Court has confined to cases where the taxpayer is insolvent, thereby bringing into operation § 3466 of the Revised Statutes (31 U. S. C. § 191). Thus the Washington Court relied principally upon the decision in *U. S.* v. *Gilbert Associates*, 345 U. S. 361 (1953), which this Court, in *U. S.* v. *New Britain*, 347 U. S. 81, 87 (1954), held inapplicable where the taxpayer was not insolvent.

[17] The decision of the courts below is also in conformity with the decisions of this Court and lower Federal courts which consistently have held that a mechanic's lien is "perfected" under Section 67(b) of the Bankruptcy Act (11 U. S. C. Sec. 107(b)) when it is recorded, irrespective of whether a suit has been filed for its enforcement. *Henderson* v. *Mayer*, 225 U. S. 631, 636 (1912); *American Coal Burner Co.* v. *Merritt*, 129 F. (2d) 314, 315 (C. A. 6, 1942); *In re Etherton*, 88 F. Supp. 874, 877 (D. C. Cal., 1950).

closure suit had been filed in the Circuit Court of Cook County, Illinois, a court of general equity jurisdiction. Petitioner filed the present suit seeking a resale of the property to satisfy its tax liens six years after the commencement of the foreclosure suit, four years after the foreclosure decree had been entered and the foreclosure sale had been held and the proceeds of the sale had been completely distributed, and a year after the property had passed into the hands of respondents as good faith purchasers for value. The established rules of *lis pendens* and of the immunity of judicial proceedings from collateral attack prevent any such unjust result as petitioner seeks here, and confirm the correctness of the decision below.

Under the rule of *lis pendens*, any interest in or lien upon real estate arising during the pendency of an equity suit involving such real estate is subject to the outcome of the suit, and anyone acquiring such an interest or lien is bound by the proceedings in such case as if he had been a party thereto.[18] The doctrine is well settled in Illinois both by common law and by statute. *Loomis* v. *Riley*, 24

[18] This long-established rule of *lis pendens*, applicable to equity suits affecting title to real estate, was not involved in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, in which the words "lis pendens" were used in the sense of meaning only constructive notice in an attachment suit. Pomeroy has expressed the meaning of the rule of *lis pendens* in the sense applicable to the real property involved in this case, as follows: "Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. * * * *lis pendens* extends to all *equitable* suits which involve the title to a specific tract of land, or which are brought to establish any equitable estate, interest or right in an identified parcel of land, or to enforce any lien, charge, or encumbrance upon land." (Pomeroy's Equity Jurisprudence (5th Ed. 1941), Secs. 632, 635).

Ill. 307, 310 (1860); *Norris* v. *Ile*, 152 Ill. 190 (1894); *Alexander Lumber Co.* v. *Kellerman*, 358 Ill. 207, 214-15 (1934); Ill. Rev. Stats. (1955) Ch. 22, Sec. 53. No acquisition of an interest in real estate during the pendency of a proceeding can "affect the power of the court to proceed to a final decree" (*Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352, 370 (1889)), "nor affect the title of him who bought under the decree" (*Eyster* v. *Gaff*, 91 U. S. 521, 524 (1875)).

Rules of real property law necessarily involve real estate which has a definite location within the State and it is most appropriate that the State's property law should govern. This Court, in a tax case, referring to state decisions as to tenancies by the entirety, held in *Tyler* v. *United States*, 281 U. S. 497, 501 (1930):

> "These decisions establish a state rule of property, by which, of course, this court is bound."

In *Brine* v. *Hartford Insurance Co.*, 96 U. S. 627, 634 (1877), on appeal from Illinois, this Court held that title coming through a judicial proceeding is a transfer of title governed by state law binding on a Federal court. This principle applies equally to the rule of *lis pendens* since it too is a state rule of property governing titles coming through judicial proceedings. *Romeu* v. *Todd*, 206 U. S. 358 (1907).

In the present case, just as this Court said in discussing the rule of *lis pendens* in *Romeu* v. *Todd*, "disregarding fundamental rules of real property" would be "creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties." (206 U. S., at 370.)

When the United States acquires an interest in or lien upon real property, it is bound by the rule of *lis pendens* regardless of its sovereign status or its constitutional

immunity from suit without its consent.[19] Freeman on Judgments (5th Ed. 1925), Vol. I, Sec. 526; *Ward* v. *Congress Construction Co.*, 99 F. 598 (C. A. 7, 1900); *United States* v. *Calcasieu Timber Co.*, 236 F. 196 (C. A. 5, 1916); *United States* v. *Mayse*, 5 F. (2d) 885 (C. A. 9, 1925), cert. denied 269 U. S. 580; and see also *United States* v. *Alabama*, 313 U. S. 274, 281 (1941). A state court equity proceeding is not terminated by the mere fact that the United States subsequently acquired an interest in property involved in the proceeding; and the state court is not thereby deprived of jurisdiction to proceed to a conclusion, binding upon such subsequently acquired interest. *United States* v. *Bank of New York Co.*, 296 U. S. 463 (1935).

Therefore, in the equity suit to foreclose the mechanic's lien on the real property involved herein, petitioner, like any other person "acquiring an interest in or lien on the property" after the filing of the suit, was "deemed a subsequent purchaser and * * * bound by the proceedings to the same extent and in the same manner as if he [it] were a party thereto."[20]

It is well settled that a valid decree cannot be collaterally attacked by a party to the proceedings (Frederick's Brewing Co.) or by one in privity to such a party (petitioner) which is bound by the proceedings as if it had been a party. *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352 (1889); *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402, 403 (1940); *United States* v. *Nourse*, 9 Pet. (34 U. S. 8 (1935); *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 90 (1923). In the *Mellen* case, this Court stated:

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[19] "* * * the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time." *National City Bank* v. *Republic of China*, 348 U. S. 356, 359 (1955).

[20] Ill. Rev. Stats. (1955) Ch. 22, Sec. 53, which is declaratory of common law.

"* * * Mellen, the trustee for Sophie H. Boyd, acquired his rights *pendente lite*.

"* * * that sale and conveyance could not affect the power of the court to proceed to a final decree, so far as his interest in the property was concerned. * * * The present proceeding is an attempt, upon the part of a purchaser *pendente lite*, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice." (131 U. S., at 370.)

Similarly, petitioner's present suit can be regarded in no other way than as a collateral attack upon the foreclosure decree, by which petitioner, which acquired a lien on the property *pendente lite*, was bound to the same extent and in the same manner as if a party to that suit. As the District Court below stated, in giving this additional reason for dismissing the complaint: "Plaintiff [petitioner] in effect is asking that the former suit be relitigated in this court."

This additional reason for dismissing the complaint is in the public interest. Purchasers of titles acquired through valid judicial proceedings should be entitled to rely upon their stability and not find those titles beclouded and rendered unmerchantable by intervening claims, such as those of petitioner. Over a century ago, this Court, in *Voorhees v. United States Bank*, 10 Pet. (35 U. S.) 449 (1836), recognized the importance of protecting, from collateral attack, titles acquired through judicial proceedings in courts of competent jurisdiction (even if the proceedings involved errors). The Court said:

"It would be a well-merited reproach to our jurisprudence, if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding, as the party who derived

> the benefit accruing from it. * * * This great rule [against collateral attack] established for the protection of purchasers on the faith of judicial process, will be utterly prostrated; * * *. The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings, nor to look further back than the order of the court." (35 U. S. at 475, 477-8.)

A court should not "disturb long-established rules of real property law" thereby upsetting "a multitude of titles." (*Greenwald* v. *McCarthy,* 402 Ill. 135, 143, 83 N. E. (2d) 491, 494 (1949)) It is especially important that a Federal Court should not disturb state rules of real property law or the titles dependent thereon. As the Court of Appeals for the Eighth Circuit stated in *United States* v. *Hutcherson,* 188 F. (2d) 326, 330 (C. A. 8, 1951):

> "We do not conceive it to be an appropriate exercise of the power and authority of a federal court to strike down a rule of property, not repugnant to any law of the United States, long established in the state, and upon which many valuable property rights are based."

Petitioner's own complaint seeks to invoke the doctrine of *lis pendens* by praying "that the defendants and all persons claiming under them or any of them *subsequent to the commencement of this action* be barred and foreclosed." (R. 11.) While the Petition does not discuss the rule of *lis pendens* pertaining to equity proceedings affecting real estate or the rule against collateral attack, it does cite (Footnote 5, pps. 11-12) certain sections of the Internal Revenue Code which are inapplicable to the issues of this case (*supra,* p. 4). In the same footnote, the Petition cites the same case that petitioner relied upon heavily for its contention on the "*lis pendens* argument"

below, namely, *Metropolitan Life Insurance Co.* v. *United States*, 107 F. (2d) 311 (C. A. 6, 1940). Since that case involved only the exercise of a private power of sale given under a Michigan mortgage, and not the filing of a foreclosure suit in an equity court of competent jurisdiction nor the entry of a decree of foreclosure, the principles of *lis pendens* and the immunity of judicial proceedings from collateral attack clearly were not involved in the decision.[21]

None of the decisions of this Court upon which petitioner relies involved comparable facts nor did they involve the important property rules of *lis pendens* and collateral attack. In none of those cases had an equity suit been commenced against real property *before* the federal tax liens attached. In each of those cases the United States asserted its tax lien before any judgment or decree had been entered or a sale of the property had been made. At that time the courts had before them the property or its proceeds and also the competing lien claimants, as well as the taxpayer. The government did not attempt in any of those cases, as it does here, to reach the property itself by a separate and subsequent suit, long after the proceedings had been completed and the property had passed into the hands of third party purchasers for value.

CONCLUSION.

This case was correctly decided by both courts below. The unanimous decision of this Court in *United States* v. *New Britain*, 347 U. S. 81 (1954) is conclusive under the

[21] The Michigan courts have "repeatedly held that a foreclosure under the statute, is an act of the party and not a judicial proceeding." *Guardian Depositors Corp.* v. *Powers*, 296 Mich. 553, 296 N. W. 675, 679 (1941). Moreover, the tax liens in the *Metropolitan* case had arisen "on August 17, 1932, prior to foreclosure" (107 F. (2d), at 312).

facts with respect to the priority question. The real property rules of *lis pendens* and the immunity of judicial proceedings from collateral attack preclude the maintenance of petitioner's present suit, and confirm the correctness of the decisions below dismissing the suit. There is no conflict with any decision of this Court or of any Court of Appeals. To the contrary, the decision below is in accordance with the pertinent decisions of this Court and with principles of equity long followed by this Court and by all courts throughout the land. For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

KENNETH F. BURGESS,
EDWARD P. SALTIEL,
WILLIAM H. AVERY, JR.,
GEORGE RAGLAND, JR.,
HENRY A. PRESTON,
Attorneys for White Bear Brewing Co. and Chicago Title and Trust Co., as Trustee, Respondents.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

March 15, 1956.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
FREDERICK'S BREWING COMPANY, ET AL.,
Defendants.
No. 53-C-2232.

MEMORANDUM.

Defendant here has moved to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted. The complaint may be summarized as follows:

An assessment for delinquent income taxes was made against Frederick's Brewing Company by the Commissioner of Internal Revenue on November 13, 1947; the assessment list was received by the Collector on November 17, 1947. No part of this assessment has been paid. Later assessments were made against the various successors to that Company. At the time of these assessments, the Company was the owner of described real estate. On September 2, 1947, a mechanic's lien was filed against the described property, by Fred W. Deutsch. Suit was filed to foreclose this lien on November 13, 1947, and the property was sold on order of court in this suit on September 28, 1950.

Various persons may have an interest in this real estate. The plaintiff prays for judgment:

> "That all persons having liens upon or claiming any interest in the property or rights to property hereinabove described be required to submit their claim; that the merits of all claims to and liens upon the property be finally determined; that the defendants and all persons claiming under them or any of them subsequent to the commencement of this action be barred and foreclosed of all right, title and interest, or lien and claim to the property and all part thereof; that the lien of this plaintiff for its taxes assessed be established and enforced against the property described in its complaint; that the property be ordered sold, in accordance with the law and the practice of this Court and that the fund resulting from such sale be ordered distributed according to the findings of the Court, in accordance with the rights and interests of the parties defendant in this suit and the United States."

It is defendant's contention that the complaint shows on its face that the plaintiff has no right to enforce its lien at this time because (1) the Government's lien did not attach until after the mechanic's lien, and is therefore subservient to it; and (2) this junior lien can not now be enforced because at the time it attached it was subject to the foreclosure suit, and has been wiped out by the judgment in that suit.

The defendant has filed with its motion an affidavit setting forth additional facts, and plaintiff has in its brief presented certain facts which it offers to support by affidavit. I will assume that the latter are correct, without requiring a formal affidavit. Since matters outside the pleadings have been introduced, the motion will be treated under Rule 12(c) as a motion for summary judgment and disposed of under Rule 56. There are no material issues of fact. As will appear later, the date of the foreclosure decree is not important.

The Government admits that its lien did not attach before November 17, 1947, the date when the assessment list was received by the Collector (26 U. S. C. A. sec. 3670, 3671; *United States* v. *Ettelson,* 159 F. 2d 193, 196 (7th, C. C. A., 1947). It contends, however, that defendant's mechanic's lien was not complet and perfect until it had been reduced to judgment. A specific and perfected state lien will take precedence over a lien for federal taxes. Whether or not a lien will be considered complete is determined by federal law (*United States* v. *Waddill,* 323 U. S. 353, 356 (1945)). *Illinois* v. *Campbell,* 329 U. S. 362, 375 (1946) set forth the criteria by which a lien may be tested, and found the "long established rule" to be that three elements must exist: (1) the identity of the lienor, (2) the amount of the lien, and (3) the identity of the property to which it attaches.

To apply the federal test to the lien, it is necessary to determine by reference to state law what its nature is. A claim was filed as a Notice of Mechanic's Lien describing the property, with the Clerk of the Circuit Court on September 2, 1947, for work completed May 19, 1947, under a contract dated February 14, 1946. A lien for services, labor or material is given by Section 2 of Chapter 82 of the Illinois Revised Statutes. Section 7 of the same Chapter provides that:

> "No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, * * * he shall either bring suit to enforce his lien therefor or shall file with the clerk of the Circuit Court * * * a claim for the lien * * *."

It has been held by the Illinois courts that this statutory lien exists from the time of the contract in an inchoate condition, and is fixed against the property at the time the notice is filed: *Robertson* v. *Huntley and Blazier Co.,* 351

Ill. App. 378, 384 (1953); *Schoenberg Mfg. Co.* v. *Broadway Hotel Corp.*, 259 Ill. App. 40, 42 (1930); *United Cork Companies* v. *Volland*, 365 Ill. 565, 573 (1937). In other words, the lien exists from the time of the contract, and may be defeated only through the failure to file the required notice. Filing perfects and completes the claim.

A federal interpretation of a very similar state statute is found in *United States* v. *Holman*, 206 F. 2d 685 (C. C. A. 5th, 1953). There, a mechanic's lien was filed and suit commenced thereon before the federal lien attached. Arguments similar to those advanced by the Government here were overruled by the court:

> "In this case the United States first argues that under the law of Alabama the liens of the appellees were inchoate. * * * We do not at all agree.
>
> "Under the law of Alabama, * * * the liens of mechanics and materialmen attach from the commencement of the building * * *. Such liens are subject, however, to be defeated and lost if the claims were not verified and filed. * * * After verification and filing their liens were complete * * *."

It was held that the liens were complete under federal law, meeting the tests set forth in *Illinois* v. *Campbell*, *supra*, and took precedence over a federal lien for taxes which was filed later. A similar result was reached in *United States* v. *Martin Fireproofing Corporation*, 168 F. 2d 808 (C. C. A. 6, 1948), where the Court concluded with the following reasoning, applicable also to this case:

> "The essential principle upon which the mechanic's lien rests is that of unjust enrichment. It is uncontradicted in this record that the giving of a priority to the United States over the mechanic's lien also gives the United States the enhancement of the value of the property which resulted from the work performed and the material supplied by the appellee." (Page 811.)

The lien in the present case attached and was complete,

under Illinois law, at the time it was filed, September 2, 1947. The identity of the lienor, the amount of the lien, and the property to which it attached, were known at that time. It therefore takes precedence over plaintiff's lien, which attached no earlier than November 17, 1947.

However, though the defendant has the prior lien, plaintiff here asks that the property be re-sold, and there is of course the possibility that there might be something left for the junior lien. However, that remedy cannot be followed at this time. The plaintiff acquired its right after November 15, 1947, and when suit was filed to foreclose the lien. Any interest in real estate acquired after the filing of such a suit is subject to the outcome of the pending litigation under the familiar doctrine of *lis pendens*. In Illinois, this is true at common law (*Alexander Lumber Co.* v. *Kellerman*, 358 Ill. 207-214, 5 (1934); *Weber* v. *Kemper*, 320 Ill. 11, 19-20 (1925)); and by statute (Ch. 22 Ill. Rev. Stat. 53). Plaintiff in effect is asking that the former suit be re-litigated in this court. Plaintiff apparently did not intervene in the former suit, and has now no remedy in that regard.

The motion to dismiss the complaint will be allowed.

PHILIP L. SULLIVAN,
Judge.

November 8th, 1954.

APPENDIX B.

Illinois Chancery Act, Section 53 (Illinois Revised Statutes (1953) Chap. 22, Section 53):

> "That every suit in equity, proceeding to sell real estate of decedent to pay debts, or other suit in the nature of suits in equity affecting or involving real property shall, from the time of the filing of the complaint or petition, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as aforesaid, not in possession of said property and whose interest or lien is not shown of record at the time of filing such complaint or petition, shall, for the purposes of this Act, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he were a party thereto. * * *"

MAY 4 1956
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR CONSIDERATION OF UNDECIDED ISSUE.

KENNETH F. BURGESS,
EDWARD P. SALTIEL,
WILLIAM H. AVERY, JR.,
GEORGE RAGLAND, JR.,
HENRY A. PRESTON,
ARTHUR R. SEDER,
Attorneys for White Bear Brewing Co. and Chicago Title and Trust Co., as Trustee, Respondents.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

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UNITED STATES OF AMERICA,
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PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR CONSIDERATION OF UNDECIDED ISSUE.

The respondents, White Bear Brewing Co., Inc., and Chicago Title and Trust Company, as Trustee, respectfully request this Court to modify the *per curiam* order of April 9, 1956, (1) by vacating so much of the order as reversed the judgment below, and placing the case on the calendar for briefs and oral argument, or, in the alternative, (2) by remanding the case to the Court of Appeals for consideration of the issue as to whether the United

States is barred from collaterally attacking a judgment of foreclosure entered by a State equity court, which had exclusive jurisdiction of the real estate involved, in a proceeding which was pending when the Government's tax liens arose.[1] That issue was expressly left undecided by the Court of Appeals, and was not presented in the petition for certiorari or passed upon by this Court.

STATEMENT OF THE CASE ON REHEARING.

The Government's suit involves vital constitutional issues concerning the relative powers of the Federal and State governments. It seeks: first, to take real property away from respondents who had previously purchased the property and made a mortgage loan on it in good faith reliance on title coming through a State court judicial proceeding foreclosing an existing mechanic's lien; and second, to have the property resold to satisfy federal tax liens (on account of taxes of a prior owner of the property) which did not arise until after the recording of the mechanic's lien and after the commencement of the State court foreclosure suit.

The case therefore involves two issues:

(1) Whether a federal tax lien, when it arises, attains priority over an existing and previously recorded mechanic's lien (referred to as the "priority issue"), and,

(2) Whether the United States, in a new suit filed long after respondents acquired title to real prop-

[1] In an equity suit involving title to real estate, such as the mechanic's lien foreclosure case, "the necessities of mankind" have long been recognized as requiring that *all interests acquired during the pendency of the suit* be bound by the decision of the court in that suit, under the rule of *lis pendens*. (Pomeroy's Equity Jurisprudence [5th Ed. 1941], Sec. 632, 635; *Secombe* v. *Steele*, 20 Howard [61 U. S.] 94, 105 [1857]; *Eyster* v. *Gaff*, 91 U. S. 521, 524 [1875]). This principle, which is applicable to all equity suits affecting title to real estate, was not involved in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).

erty coming through a mechanic's lien foreclosure decree and sale, can collaterally attack the foreclosure decree previously entered in a State court proceeding which was in process of adjudication when the federal lien arose (the "*lis pendens-collateral attack* issue").

The District Court decided both of these issues in favor of respondents and dismissed the complaint.[2]

The Court of Appeals, affirming, decided the priority issue in respondents' favor, but found it unnecessary to reach the second issue, stating as follows (227 F. 2d 359, at 370):

> "While we think defendants' position resting upon their *lis pendens* argument suggest some merit, it is unnecessary to reach that point because the judgment appealed is hereby affirmed."

The Government's petition for certiorari did not raise the *lis pendens-collateral attack* issue. Neither the *per curiam* order granting certiorari and reversing the judgment below, nor the dissenting opinion, makes any reference to this issue.

I.

IN VIEW OF THE WIDESPREAD EFFECT OF THE DECISION ON THE QUESTION OF THE RELATIVE PRIORITY OF LIENS, THE SUMMARY REVERSAL SHOULD BE VACATED AND THE CASE PLACED ON THE CALENDAR FOR BRIEFS AND ORAL ARGUMENT.

The question whether a recorded mechanic's lien is superior or inferior to a subsequent federal tax lien is of

[2] The District Court treated the motion to dismiss as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. That Court found that the mechanic's lien was entitled to priority, and that the relief sought by the Government, as a junior lien-holder, was precluded by the doctrine of *lis pendens* and the rule against collateral attack.

substantial and widespread public importance, especially to labor and the construction industry. The decision of this question, and the implications of the decision, are of such significance that it is most desirable to have the benefit of an opinion of this Court, after submission of briefs and argument.

From the *per curiam* order, it appears that a perfected lien existing under State law can not prevail against a subsequent federal tax lien under Section 3670, unless and until reduced to judgment, although there is no such provision in the federal statutes. It should be made clear whether this Court intends to overrule *U. S.* v. *New Britain*, 347 U. S. 81 (1954), or to distinguish it. If this Court intends any of these results, the commercial world and the Bench and Bar should be so informed by an opinion of this Court.

II.

THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS TO DECIDE THE LIS PENDENS — COLLATERAL ATTACK ISSUE WHICH IT EXPRESSLY LEFT UNDECIDED.

Consideration of the *lis pendens-collateral attack* issue has not been given by the Court of Appeals or by this Court, although on that ground alone the judgment of the District Court was correct. Respondents have contended throughout that, apart from the priority issue, the relief sought by the Government, which acquired its liens *pendente lite*, is barred by the rules of *lis pendens* and the immunity of judgments from collateral attack.

This issue, which the Court of Appeals did not decide, involves important questions concerning the interrelations between federal administrative power in the collection of

taxes[3] and State judicial power and between federal action and established State rules of real property law. Among these questions are the following:

1. Is the United States, upon acquiring an interest in real estate during the pendency of a State court judicial proceeding, immune from application of the doctrine of *lis pendens* which has long been established by common law and statute as a rule of real property in the several States?

2. After a State court in an equity proceeding has acquired jurisdiction over real property and all parties then having any interest in the property, may the United States disregard such pending proceeding and through a subsequent independent suit take the property to satisfy a tax lien which arose after the State court proceeding was instituted?

3. May the United States collaterally attack a judgment of a State court, by which it was bound as if a party thereto, by a new suit filed years after such judgment was entered?

4. May the United States attack the title of a purchaser of real property derived through a State court mechanic's lien foreclosure sale, by a new suit filed years after the sale had been confirmed and the proceeds of the sale distributed?

In order for the Government to prevail in the present case, it would be necessary to answer all of these questions in the affirmative. Any such result would extend federal power far beyond any limit authorized by the Federal Constitution and statutes or by the decisions of this Court, and would deprive the States of powers in judicial proceedings which heretofore have always been recognized. A carefully considered resolution of these questions, which comprise the *lis pendens-collateral attack* issue, is im-

[3] In this case, the federal administrative power was exercised merely by delivery of the assessment list to the collector and demand for payment.

portant not only to the administration of justice in State courts but to the stability of real estate titles throughout the country.

If this Court adheres to its decision to reverse the judgment of the Court of Appeals on the priority issue, then the case should be remanded to the Court of Appeals for consideration of the *lis pendens-collateral attack* issue which that Court did not decide. The suggested procedure is consistent with this Court's practice in similar cases in the past, the most recent instance having been in No. 298, October Term, 1955, *Union Trust Co., et al.* v. *Eastern Air Lines, Inc.* in which this Court entered the following order on February 27, 1956:

> "On consideration of the petition for rehearing, the order of December 5, 1955 [granting the petition for writ of certiorari and reversing the judgment below] is reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment."

Remandment of the *lis pendens-collateral attack* issue to the Court of Appeals, which expressly left that issue undecided, rather than to the District Court in the first instance, will promote orderly and expeditious procedure.

CONCLUSION.

For the foregoing reasons, respondents request this Court to vacate so much of the *per curiam* order of April 9, 1956 as reversed the judgment below, and to place the case on the calendar for briefs and oral argument; or, if such request is denied, to modify the *per curiam* order of April 9, 1956 and remand the cause to the Court of Appeals for consideration of the remaining issue presented by this case.

Respectfully submitted,

KENNETH F. BURGESS,
EDWARD P. SALTIEL,
WILLIAM H. AVERY, JR.,
GEORGE RAGLAND, JR.,
HENRY A. PRESTON,
ARTHUR R. SEDER,
Attorneys for White Bear Brewing Co. and Chicago Title and Trust Co., as Trustee, Respondents.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

May 4, 1956.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

WILLIAM H. AVERY, JR.

MAY 4 1956
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., and CHICAGO TITLE AND TRUST COMPANY, as Trustee, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF ILLINOIS BANKERS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

FRANK D. MAYER
RALPH F. HUCK
FREDERICK R. SHEARER
ROBERT L. STERN
GEORGE H. JIRGAL
PERRY M. CHADWICK
Attorneys for Amicus Curiae
231 South La Salle St.
Chicago (4), Illinois

CHAPMAN and CUTLER
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
Of Counsel

May 3, 1956

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This brief is being filed on behalf of Illinois Bankers Association, pursuant to written consent, filed with this brief, of the parties to the case as required by Rule 42 of this Court.

Inasmuch as there was no lapse of time between the grant of certiorari and decision on the merits, *amicus curiae* has had no prior opportunity to present its views. There was no occasion to do so until certiorari was

granted, since there was no objection to the decision below and since the reason for presenting this statement could arise only when it became known that this Court would review that decision.

I.

INTEREST OF AMICUS CURIAE IN THE CASE.

The members of Illinois Bankers Association include 916 out of a total of 933 state and national banks located in Illinois. These members are required to and do furnish financing in all fields of trade and industry and in all aspects of the economy, from the manufacturer or producer down to and including the consumer. In doing so they necessarily rely upon many varied forms of security for loans, including in many instances the benefit and value of the liens accorded to contractors, subcontractors and suppliers under the mechanic's lien laws of the State of Illinois.

Accordingly these banks are vitally interested in determining the exact nature and extent of the priority to be afforded to *subsequent* Federal tax liens which may have the effect of destroying the value of the work and material contributed to a given project by the contractor, subcontractor and supplier whom the banks have financed, and who for more than a century have been given protection under the laws of the State of Illinois even as against prior encumbrances.

But the interest of Illinois Bankers Association, and of banks in general, is not limited to the particular form of security expressly involved in the issues in this case. The *per curiam* order of the Court, when combined with the language of the dissenting opinion of Justices Douglas and Harlan, causes grave and justifiable concern and

great uncertainty as to whether the rules of law resulting from the action of the majority of this Court through the *per curiam* order are intended to and do apply to a great number of forms of security which are recognized and afforded protection by state law and which may or may not fall within a strict or narrow interpretation of the special classes of security mentioned in §3672 of the Internal Revenue Code of 1939.

The lack of an opinion by the majority of this Court plus the statement in the dissenting opinion of the two Justices that:

> "The Court apparently holds that under 26 U.S.C. §3670 a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent tax lien, short of reducing the lien to final judgment."

raises a substantial question as to whether loans made by banks on the security of assignments of accounts receivable, or on the basis of factors' liens, or through the use of trust receipts or conditional sale agreements, all of which are recognized and protected by the law of most states, are now vulnerable to *subsequent* Federal tax liens.

ARGUMENT.

Wholly apart from the relative merits of the Petitioner's or Respondents' respective claims to priority, and whether or not the judgment appealed from is reversed or affirmed, the entry of the reversal order without a majority opinion leaves unsolved the question of whether in ordering such reversal the majority merely intended to hold that this particular lien did not meet the required tests for a choate lien as heretofore laid down by this Court, or whether the majority intends now to give to the word "choate" a definition so narrow as to include only the two types of lien holder, *i.e.* "mortgagee and pledgee", expressly mentioned in §3672, and that as a result the holders of all other forms of security must actually reduce their lien to a judgment before such lien holders can be protected against *subsequent* Federal tax liens.

We respectfully submit, therefore, that it is essential in any event to have the benefit of an opinion of this Court after submission of briefs and after oral argument.

A.

Mechanics' Liens Contrasted To Remedial Liens.

If the Court in reversing merely intended to hold that this particular lien was not choate because the lien had not been reduced to judgment, then we respectfully submit that the Court has overlooked or misapprehended the true nature and scope of a mechanic's lien under Illinois law.

In determining the status of a mechanic's lien in relation to *subsequent* Federal tax liens, we believe it is erroneous to treat mechanics' liens as though they had the same nature or status as liens arising from, as an

example, garnishment and attachment statutes. In the cases involving the priority of garnishment and attachment liens as against prior or subsequent Federal tax liens, it is always clear that the claim or debt sought to be recovered through the use of attachment or garnishment process did not arise, nor was it contracted for, in reliance upon or with a view to taking advantage of the given attachment or garnishment statute involved. Rather in those cases the remedy by way of attachment or garnishment arose in a sense as a mere happenstance, simply because it happened to be an available *remedy* under applicable statutes in the course of enforcing a *simple contract* or tort claim. There was therefore no equivalence between the amount of the attachment or garnishment and the specific amount eventually recoverable.

We respectfully submit that a mechanic's lien is not the same sort of "statutory lien" as an attachment or garnishment lien in the sense that on the question here involved this Court should apply the same standards that it does to those liens. Rather, as this Court has said in *Van Stone* v. *The Stillwell & Bierce Manufacturing Company,* 142 U.S. 128, 136,

> "The lien (mechanic's) is brought in operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to the statute."

The contractual or consensual nature of a mechanic's lien as contrasted with a lien by way of attachment or garnishment which comes into existence only through availability, by happenstance, of that kind of statutory process in the course of enforcing a simple contract or tort claim, is further shown by the provision of § 21 of the Illinois Mechanic's Lien Law to the effect that the owner and the

prime contractor may effectively contract that no such lien shall exist and that the effect of such a contract is to deprive all subcontractors, etc., of any right to a lien under the statute.

The Supreme Court of Illinois in the case of *Rittenhouse Co.* v. *Warren Co.*, 264 Ill. 619, held that a mechanic's lien was of such a contractual or consensual nature that it would be unconstitutional for the Illinois Legislature to deprive the parties of their freedom of contract by attempting to provide that the lien should exist notwithstanding a contract to the contrary by the parties.

It is one thing to compare, on the one hand, a lien given under the state law by way of *remedy* (*e.g.*, attachment or garnishment) for the collection of a simple contract or tort claim, with, on the other hand, the lien under § 3670 I.R.C. by way of *remedy* for collection of a tax, and to say in comparing those two *remedial* liens that the *remedial* liens given by state law are junior to the *remedial* lien given for Federal taxes. It is an entirely different thing to compare a lien which is *contractual and consensual* in its nature with the *remedial* lien given by § 3670 I.R.C., and to say that the *subsequent remedial* lien of the Federal government shall have the effect of striking down the contract rights of the parties under state law and abrogating express provisions of state law.

By allowing a *remedy* given to the Federal government by § 3670 I.R.C. to have priority over a mechanic's lien, the Court is allowing a *remedy* of the Federal government to deprive the holder of the mechanic's lien of the benefit and property rights acquired under § 16 of the Illinois Mechanic's Lien Law. So far as pertinent here that section provides as follows:

"No encumbrance upon land, created before or after the making of the contract under the provisions of this Act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished materials shall have been satisfied, and upon questions arising between encumbrancers and lien creditors * * * the lien creditor *shall be preferred* to the value of the improvements erected on said premises * * *."

A mechanic's lien grows out of a direct enhancement of the *value* of the particular property in question. The lien holder has added to the estate of the taxpayer an increment of value and it appears highly inequitable that when he has done everything possible to pursue his lien, short of reducing his claim to judgment, the Federal government should be permitted to deprive him of his right under state law to recover that enhanced value.

Expansion of the doctrine announced by this Court in attachment and garnishment cases to extend it to perfected liens like a mechanic's lien is not required by the earlier decisions of the Court. In the only other mechanic's lien *v.* Federal tax lien case to come before the Court (*United States* v. *Colotta,* 350 U.S. 808 (1955)) the mechanic's lien had not been recorded, nor had any *lis pendens* notice been filed, before the Federal tax lien arose. In the present case the record shows that the lien had been recorded and suit to foreclose had been commenced before the first of the assessment lists was received by the Collector.

The effects, both direct and indirect, of any such extension of the doctrine are most alarming in business and construction circles. It casts a shadow not only on much of the construction financing but also upon numerous financing and security arrangements that have been accepted as giving an unquestioned priority against *subsequent* Federal tax liens even though they are not specifically designated in §3672.

B.

Nothing in § 3672 of the Internal Revenue Code of 1939 as Amended Adversely Affects, As Against Subsequent Federal Tax Liens, Prior Contractual or Consensual Liens Perfected Under State Law.

We respectfully submit that there is no reason to believe that when Congress first passed § 3672 I.R.C. in 1913, and thereafter amended it from time to time to extend the protection against *secret antecedent* Federal liens, Congress also intended to limit to the specific classes therein described, *i.e.*, "mortgagee, pledgee, purchaser or judgment creditor," protection against *subsequent* Federal tax liens. Nevertheless the lack of a majority opinion of the Court in this case, when coupled with the remarks made in the dissenting opinion, necessarily leaves room for the interpretation that this Court is now holding that § 3672 has this double effect.

If that is the intended result of the *per curiam* order in this case, the effect is indeed awesome to contemplate. While exact figures are not available, we believe it fair to state that banks throughout the country have in the aggregate on their books loans running into many billions of dollars secured by what have always been considered perfected choate liens under state laws even though such liens might or might not come within a strict interpretation of "mortgage or pledge" as used in § 3672. The kind of liens we refer to are those arising out of assignments of accounts receivable, out of so-called Factor's Lien Acts, arising from the use of the Uniform Trust Receipts Act (which has been adopted in 31 states), from conditional sales agreements and from many kindred forms of security. An article in The Commercial and Financial Chronicle of Tuesday, March 8, 1956, points out that the National Commercial Finance Conference Inc.

reports that in 1955 financing by members of that Conference alone (which does not include banks) of accounts receivable totalled approximately $4.9 billion. In the same report it was disclosed that 24 factoring concerns operating in and around the New York metropolitan area accounted for an over-all volume of $3.150 billion in 1955.

So long as § 3672 is interpreted to apply only to *antecedent* Federal tax liens, and so long as liens (at least those that are contractual or consensual in nature) which have been perfected under applicable state law are unaffected by *subsequent* Federal liens, it is at once apparent from the results that the financing which the economy of the country requires has been and can be effectively carried on. Since, except in the few instances involving liens on ships, railroad cars or airplanes, there is no Federal law providing for the manner of perfecting liens between private parties to secure private debts, it is essential that state law exist whereby, at least in the field of contractual or consensual liens, liens may be perfected.

We respectfully submit that when Congress in 1913 originally passed what is now § 3672, and later from time to time amended it to remove deficiencies which made some *secret antecedent* Federal tax liens superior to certain forms of security, Congress believed that no provision was necessary to protect prior liens against *subsequent* Federal tax liens because such prior liens, at least in the field of contractual and consensual liens, would be protected by the usual priority rule of "first in time, first in right." The Report of the House Judiciary Committee which accompanied the 1913 amendment clearly shows this, and because only a part of that Report is referred to in Justice Jackson's concurring opinion in *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 52, we are attaching as Appendix A a complete copy of that Report.

One sentence from that Report is most significant in connection with this particular phase of the problem:

> "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."

Certainly in the field of contractual liens which have been perfected under applicable law, this statement would include, at least, the principle that first in time is first in right. For this Court now to apply in the field of contractual and consensual liens its own test of what is and what is not a choate lien in substitution for what is and what is not perfection under applicable state law, is to change the 1913 amendment and the intent of Congress in connection with it from the protection of liens against *secret antecedent* Federal tax liens into a weapon to strike down, for the benefit of *subsequent* Federal tax liens, contractual and consensual liens which have been fully perfected under applicable state law.

It is important also to note that when Congress amended § 3672 in 1939, there were already a significant number of lower Federal Court decisions which had held that an antecedent statutory lien which was "inchoate" by the standards laid down by this Court in attachment, garnishment and similar cases, nevertheless had priority over *subsequent* Federal tax liens. Under those cases the fact that the statutory lien was inchoate was regarded as so immaterial that the question was not even investigated by the Court.* Some of those lower court cases go back to the early 1930's and some to the 1920's. In the face of those cases Congress did nothing to assert the

*A good collection of those cases is assembled in Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien", appearing in 63 Yale Law Journal 905, 924, f.n. 115.

riority of *subsequent* Federal tax liens against such in-
ioate liens, although it was at the same time amending
3672 to give greater protection to the public against
ecret antecedent Federal tax liens by specifically includ-
ng "pledgees" in the class of lien holders protected
gainst unrecorded liens, and by creating an exception
ith respect to "securities" as therein defined as to even
ntecedent recorded Federal tax liens.

To decide to affirm the decision below, it is not neces-
ary for this Court to overrule or disregard any of its
rior decisions. This is so because, as already pointed
ut, none of its previous decisions, excepting only possibly
e *per curiam* order in this case, necessarily implies or
olds that contractual or consensual liens perfected under
pplicable state law must also undergo a test of meeting
andards of being "choate" or "inchoate" as determined
y this Court on the basis of the facts in each particular
ase. To apply its own test to contractual or consensual
ens will inevitably lead this Court into the dilemma of
olding that some uncertainties are sufficient to subordi-
ate some contractual or consensual liens to *subsequent*
ederal tax liens, whereas exactly the same uncertainties
ill have no adverse affect upon other contractual or
nsensual liens which happen to fall within the definition
a "mortgage" or "pledge" under § 3672. As an ex-
mple, when a suit is instituted to foreclose a mortgage
nder Illinois law, it is possible that the asserted lien of
e mortgage is just as "uncertain" or "inchoate" as the
overnment contends the mechanic's lien is in this case,
the sense that the Court must still decide whether (i)
e're are any prior liens, (ii) there are any defenses to
e validity of the mortgage, and (iii) there are any
efenses, counterclaims or set-offs to reduce or wipe out
e amount claimed by the plaintiff to be secured by the
ortgage. If those uncertainties are to adversely affect

a mechanic's lien, or any other lien not qualifying as a "mortgage" or "pledge", there would appear to be no logical reason why the same uncertainties should not similarly adversely affect a mortgage as against *subsequent* Federal tax liens. The illogical result of that dilemma would be to protect, because of the express wording of § 3672, mortgages and pledges as against *secret antecedent* Federal tax liens, but to destroy such mortgages or pledges as against *subsequent* and presently non-existing Federal tax liens.

CONCLUSION.

In view of the foregoing, a rehearing should be granted so that the questions discussed above can be fully presented by brief and oral argument.

Respectfully submitted,

FRANK D. MAYER
RALPH F. HUCK
FREDERICK R. SHEARER
ROBERT L. STERN
GEORGE JIRGAL
PERRY M. CHADWICK
Attorneys for
Illinois Bankers Association,
Amicus Curiae.

CHAPMAN And CUTLER

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
Of Counsel.

APPENDIX A.

Lien For Taxes.

July 17, 1912—Referred to the House Calendar and ordered to be printed.

Mr. Sterling from the Committee on the Judiciary, submitted the following

Report.

[To accompany H. R. 25780]

The Committee on the Judiciary, to whom was referred the bill (H. R. 25780) to amend Section 3186 of the Revised Statutes of the United States, report the same to the House with the recommendation that it do pass.

Section 3186 of the Rev. Stats. is as follows:

> "Sec. 3186 If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interests, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person."

This section makes any delinquent tax due the United States a lien on all the property of the person delinquent in the payment of the tax, wherever it may be situated within the United States. A person proposing to buy the property of another could protect himself against such a lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any

person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors. It is proposed to amend the section by adding the following:

> *"Provided, however,* that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the registrar or recorder of deeds in the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to such lien is situated: *Provided further,* that the provision herein relating to the filing of notice shall be applicable whenever, and only whenever, the laws of the State wherein the property is situated shall authorize the filing of such notice in the office of the registrar or recorder of deeds as provided herein."

The amendment becomes effective in any State only when the legislature of that State authorizes the filing of notice of such lien by the collector in the office of the registrar or recorder of deeds of the county or parish where the property is situated.

It provides a very simple means of giving this notice that would not at all be burdensome upon the Government.

In the case of the *United States* v. *Snyder* (149 U.S. 210) the Supreme Court held that the lien created by sec. 3186 is a valid and binding lien even against a *bona fide* purchaser or encumbrancer in good faith for value, without knowledge or notice of the existence of such a lien. The Federal statute makes no provision for giving notice, constructive or otherwise, of the lien created by said section, and in the case above cited it was held that the recording acts of the several States have no force or

effect as against the lien of the Government; and the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.

The recent act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property, and to facilitate business transactions. There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual.

It is believed that the States will very readily pass legislation authorizing the filing of notice in the office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens cannot know of except at great cost of money and time. This law simply gives the States the opportunity to do so if it wishes to save its citizens from this unnecessary burden.

MAY 8 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 699

UNITED STATES OF AMERICA,
Petitioner,

vs.

WHITE BEAR BREWING CO., INC., AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE ILLINOIS STATE FEDERATION OF LABOR, AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING.

DANIEL D. CARMELL,
318 W. Randolph Street,
Chicago, Illinois,
Attorney for Illinois State Federation of Labor, Amicus Curiae.

A. C. LEWIS,
SHERMAN CARMELL,
Of Counsel.

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BRIEF OF THE ILLINOIS STATE FEDERATION OF LABOR, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING.

STATEMENT.

Written consent to the filing of this Brief, *amicus curiae,* in support of the Petition for Rehearing, has been obtained from all parties hereto and has been filed with the Clerk, as provided in Rule 42 of this Court.

INTEREST.

The interest of the Illinois State Federation of Labor as *amicus curiae* in this proceeding derives from the fact that as an autonomous, non-governmental, voluntary labor organization composed of over 500 local unions and consisting of more than 1,100,000 members in the State of Illinois, a large percentage of whom are engaged in the building trades industry and who are dependent upon the effectiveness and enforcibility of liens provided by the statutes of the State of Illinois for the security of their wages and earnings in the construction industry.

The Illinois State Federation of Labor is deeply concerned with the question of whether a recorded mechanic's lien is superior or inferior to a subsequent federal tax lien and it is of substantial and wide-spread public importance, especially to the labor and construction industry.

Mechanic's lien statutes have been enacted by the states for the protection of suppliers of labor and material who enhance the value of real estate of others. If the federal government, by means of a secret lien, can unjustly enrich itself at the expense of the laboring and material man, then the protection heretofore afforded by mechanic's lien statutes is lost. The ever-present threat of a lurking secret federal tax lien would, no doubt, be a serious deterrent to the undertaking of much of the reconstruction and rehabilitation work which is so sorely needed throughout the nation. The loss of protection of the state mechanic's lien statutes would of necessity require the posting of adequate security by contractors undertaking construction work sufficient to meet the wages of the laboring man.

The decision of the question before this court and the implications of the decision is of such significance that it is most desirable to have the benefit of an opinion of this court after submission of briefs and argument.

ARGUMENT.

I.

THE EFFECT OF THE PER CURIAM DECISION UNDER THE CIRCUMSTANCES OF THIS CASE WILL BE CHAOS AND UNDUE HARDSHIP IN THE BUILDING TRADES AND RELATED INDUSTRIES.

Before arguing the law applicable to the facts of this case, it might be well to illustrate the probable and almost inevitable effect of the *per curiam* decision of this Court. A is the owner of a large industry that employs many people and reputedly of large earnings. In May, 1956, he contracts with B to build a residence on lots owned by him for the sum of $60,000.00, and thereupon B purchases material and employs laborers. Depending upon the promise of A to pay the full contract price, B accumulates large obligations. In January, 1957, the building nears completion, A, however, neglects to pay to the Government the withholding tax of some several hundred of his employees, amounting in round figures to $60,000.00. On January 10, 1957, B becomes uneasy and causes his attorney to check the records in the County in which the property is located and finds that there is recorded against the property no liens of any kind or character. He thereupon files his own mechanic's lien as provided by the statute of the State of Illinois and begins suit to foreclose this lien. On February 1, 1957, the Government places an assessment in the hands of the Collector. This action by the Government under the *per curiam* opinion becomes a lien on this property superior to the lien of the contractors and the laborers, who have by their materials and effort enhanced its value.

Now if this secret lien of the Government for taxes accruing long after the contract has been entered into and

growing entirely out of a separate industry, is held to be superior to the statutory lien created by the statutes of the State of Illinois and relied upon by the contractor, his material suppliers, and the laborers, it will result in the impoverishment of the contractor, the defrauding of the material suppliers, and the loss of wages to the laborers; thereby entailing unknown hardships to their families, and the nullification of the mechanic's lien statute. This will result in confusion in the building trades industry, and it will require the contractor, the laborer and the supplier to demand security in addition to the property that their material and labor enhanced. It will prevent many young people from building homes sorely needed by their families, because of their inability to supply the additional security made requisite by the construction now given by this Court. The result will be inferior housing and lower standards of living and will impose an additional burden upon interstate commerce, a result certainly never contemplated by the Congress.

A.

The Per Curiam Decision of This Court Exposes Lienors to the Hazard of Secret Liens.

Under the above given example, B, in seeking to ascertain all relevant facts and possibilities of liens or encumbrances upon the property, and asserting all due diligence, finds himself in the position of relying upon the records of the county in which the property is situated, and yet, he is still unable to protect his prior perfected lien.

The lien of the government is secret. 26 U.S.C., Sec. 55 makes it a misdemeanor for a federal employee to disclose any information.

Under the authority of 5 U.S.C., Section 22, the Treas-

ury Department, through the Commissioner of Internal Revenue, at an early date issued instructions forbidding the disclosure of the contents of the records in the offices of the various collectors of internal revenue. 165 A.L.R. 1302, 1355. In 1898 these instructions were promulgated as certain general rules for the collectors and subordinates. 165 A.L.R. 1302, 1358.

Thus the "lien" of the government is secret in every sense of the word. In practical application, B, the lienor, will not be able to ascertain whether A is delinquent in his payment of taxes, as the interests of the two parties are hostile to each other. Without the consent of the taxpayer the procedure required to secure the information from the Internal Revenue Service is so time consuming and cumbersome if it is at all available as to be of practically no effect. Time is of the essence if B must perfect his lien and preserve the priority intended under the state mechanics lien laws. The final and inevitable result is that B must act at his peril, unable to effectively protect the many interests involved against such government secret liens.

The *per curiam* opinion of this Court has in effect stated that a prior, perfected, choate mechanic's lien as determined by federal law in the courts below is still subordinate to a subsequent, secret, unrecorded federal lien. Under these circumstances, though Congress has not stated in Section 3670 that a priority lien shall be established, this Court has so construed the Section. A therefore can only protect his priority if he becomes a judgment purchaser and it is an obvious fact that under the laws of the State of Illinois, a purchaser from a decree of foreclosure, does not receive a deed until after the fifteen-month period of redemption has elapsed, and is therefore not possessed of true and complete title until fifteen months after the sale. (Chapter 77, Sec. 16-18, Illinois Revised Statutes (1955).) It could not have been the intent of Congress that by

merely using the word "lien" in Section 3670, it intended to nullify the laws of the State of Illinois in regard to foreclosure of mechanic's liens.

B.

The Supreme Court of Illinois Determines the Rights of Lienors Under Illinois Statutes.

This Court has held that the question of perfection of a lien is a matter of federal law. *United States* v. *Scovil, et al.*, 348 U.S. 218, 99 L. ed. 271, 75 S. Ct. 244; *United States* v. *Waddill, Holland and Finn*, 323 U.S. 353, 89 L. ed. 294, 65 S. Ct. 304.

It has also been held by this Court, however, that the nature of the *rights* flowing from the mechanic's lien in Illinois must be determined by the law of Illinois. *Spokane County* v. *United States*, 279, U.S. 80, 73 L. ed. 621; *United States* v. *Waddill, Holland, and Finn*, 323 U.S. 353; 89 L. ed. 294, 65 S. Ct. 304; *United States* v. *Texas*, 314 U. S. 480, 487, 86 L. ed. 356, 362, 62 S. Ct. 350, 48 An. Bankr. N.S. 514.

The Illinois Supreme Court has held that a mechanic's lien claimant has a lien from the date of his contract which can be defeated only by a failure to file the notice thereof within four months after the completion of work. *United Cork Companies* v. *Volland*, 365 Ill. 564, 7 N. E. (2d) 301. The mechanic's lien statute of the State of Illinois has the effect of giving the claimant superior and complete right to the proceeds of the property involved. Thus the right flowing from the mechanic's lien statute is the right of a paramount encumbrance even as against a mortgage. *Noel State Bank* v. *Blakely Real Estate Improvement Co., et al.*, 321 Ill. App. 594, 53 N. E. (2d) 621.

Illinois construes the mechanic's lien act to become part of any contract between the land owner and the contractor for the erection or improvement of a building. *Robertson*

v. *Huntley and Blazier Company,* 351 Ill. App. 378, 115 N. E. (2d) 533; *Dunbar* v. *New York,* 251 U. S. 516, 64 L. ed. 384.

In light of the holding in *Noel State Bank* v. *Blakely Real Estate Improvement Co., et al.,* 321 Ill. App. 594, 53 N. E. (2d) 621, and the factual situation there involved, the decision of the Supreme Court of Louisiana in *Louisiana State University* v. *Hart, et al.,* 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, at 1372 and 1373, becomes extremely pertinent, where the Court said:

> "It is undisputed that Section 3670 of the Internal Revenue Code creates a tax lien but does not give it priority. It is also undisputed that the general lien created by that statute is inferior to prior mortgages or equitable or legal liens and encumbrances. It would seem to be anomalous, therefore, to say that if a mortgage intervened between the date the attachment was obtained by the Louisiana State University and the date the tax lien of the United States arose, the privilege or the lien of the University would be superior to the mortgage, which, in turn, would be superior to the tax lien of the United States, but that the tax lien of the United States, would be superior to the privilege of the University. That, however, is the situation that would result if the argument on behalf of the United States is followed to its logical conclusion. We do not think the law sanctions such an anomalous situation."

II.

THE EFFECT OF THE PER CURIAM DECISION IS TO DEPRIVE A PARTY OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fifth Amendment to the Federal Constitution provides that property may not be taken without due process of law. The District Court and Court of Appeals have held the instant lien to be choate. A choate lien is property

APRIL 9, 1956.

Decisions Per Curiam.

No. 699. UNITED STATES *v.* WHITE BEAR BREWING CO., INC. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. Dissenting opinion by MR. JUSTICE DOUGLAS in which MR. JUSTICE HARLAN concurs. *Solicitor General Sobeloff, Acting Assistant Attorney General Rice* and *Harry Baum* for the United States. *Kenneth F. Burgess, Edward P. Saltiel* and *William H. Avery, Jr.* for the White Bear Brewing Co. et al., respondents. Reported below: 227 F. 2d 359.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN concurs, dissenting.

I dissent. The Court holds that a federal tax lien has priority over a statutory mechanic's lien, even though the mechanic's lien was specific, prior in time, perfected in the sense that everything possible under state law had been done to make it choate, and was being enforced before the federal tax lien arose. The mechanic's lien arose out of a contract to furnish labor and materials for the improvement of the real estate. The contract had been performed, the mechanic's lien recorded for a specific amount, and suit instituted to enforce the lien—all before the federal taxes were assessed and the tax liens recorded. Moreover, by the time the United States filed the present action to foreclose its tax liens, the mechanic's lien had been reduced to judgment, and the real estate sold at public auction and transferred by the purchaser to others. In *United States* v. *City of New Britain*, 347 U. S. 81, 84, we said that liens under state law were "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." Accordingly, we held that the principle that

"the first in time is the first in right" (*id.*, at 85) should be applied. I would apply the same principle here.

None of our other cases stands in the way. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, involved a general inchoate attachment lien which had been procured by the holder of an unsecured note. The attachment lien gave no right to proceed against the property unless the lienor obtained a judgment within three years. In *United States* v. *Acri*, 348 U. S. 211, the attachment lien was contingent upon the outcome of the suit for damages and was therefore "inchoate." *Id.*, at 214. The same was true of the lien of the garnisher in *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215. In *United States* v. *Scovil*, 348 U. S. 218, the landlord's distress lien was "only a caveat of a more perfect lien to come." *Id.*, at 220. And in *United States* v. *Colotta*, 350 U. S. 808, the mechanic's lien which we subordinated to the federal tax lien had become definite in amount but no steps had been taken to file the statutory *lis pendens* notice nor to enforce the lien before the federal lien arose and was recorded.

Here the lien is not general and inchoate. It is specific and choate. The lienor had an immediate right to "enforce his lien" against the property. Ill. Rev. Stat., 1953, c. 82, § 9. This is clearly more than "merely a *lis pendens* notice that a right to perfect a lien exists." 340 U. S., at 50. Indeed, the mechanic's lienor had instituted suit to enforce the lien before the federal tax lien arose and had completed enforcement of the lien by the time the United States instituted the present action.

The Court apparently holds that under 26 U. S. C. § 3670 a lien that is specific and choate under state law, no matter how diligently enforced, can never prevail against a subsequent federal tax lien, short of reducing the lien to final judgment. That is new doctrine, not warranted by our decisions, and supportable only if the *New Britain* case were overruled.